1484 d 2

THE RIGHTS OF THE CLERGY OF Great Britain;

As Eſtabliſhed by the CANONS; the COMMON LAW; and the STATUTES of the Realm.

BEING,

A Methodical Collection under proper Titles, of all things relating to the Clergy, which lie diſperſed in the Volumes of thoſe Laws. But chiefly of ſuch Things which depend on Acts of Parliament, and upon ſolemn Reſolutions of the Judges in the Courts at *Weſtminſter*; In CASES concerning the Rights, Duties, Power, and Privileges of the Clergy.

By **W. Nelſon**, of the *Middle-Temple*, Eſq;

——*Durum ex me diſce Laborem,*
Fortunam ex aliis.

LONDON,
Printed for *Charles Harper*, at the *Flower-de-luce*, over againſt St. *Dunſtan*'s Church in *Fleetſtreet*. 1709.


BRITISH MUSEUM
28
56
APR

TO THE

CLERGY

OF

Great Britain.

IT was the Prerogative of the First-born to be both King and Priest; and this may be a Reason why the Eldest Son was to have a double Portion, that he might better support both those Dignities which did formerly thus Concur in one Person till there was a positive Law to seperate them, and that was not till the Priesthood was settled in Aaron, *and the Civil Government in* Moses.

The Church being then reduced to a Publick Policy, and governed by Priests of Divine Institution, it was necessary, that as such, they should be Reverenced by the People, therefore they were crowned with Mi-

ters of fine Linnen, they offered in Veſſels of Silver and Gold, and the very Wax Lights by which they performed their Evening Sacrifices were ſet before them in Candleſticks of Gold; they were anointed with the ſame Oyl with Kings, and they had a Revenue ſuitable to their Dignity, which did not conſiſt meerly in Tythes, but in a certain part of all the Sacrifices (except the Sin offering) in the firſt Fruits of Corn, Wine, and Oyl, in the Firſt-born of Men, and all unclean Beaſts which were redeemed at the value of 12 *s.* 6 *d. paid to the Prieſt, and even amongſt the Civilized* Gentiles *it was an univerſal Cuſtome to honour their Prieſts, and what is univerſal hath always an Appearance of being reaſonable.*

Thus the Romans *had ſo great a Reverence for the Dignity of their Prieſthood, that the Office of the* Augurs *was limited only to the Families of* Noblemen, *which continued till the* Tribunes *of the* People *brought it amongſt the* Plebeians, *and long before that it was imputed to* Jeroboam *to be as great a Fault as any in his Reign to have choſen the Prieſts out of the loweſt of his Subjects.*

But

But to come nearer Home, the Clergy were in ſo great Eſteem throughout the whole courſe of the Britiſh *and* Saxon *Succeſſions, that they were always the Judges of this Nation; and not only ſo, but their Judicial Determinations were uſually grounded upon thoſe very Laws which they themſelves had propoſed and approved.*

And afterwards, when they had above the third part of the Land in their Poſſeſſion diſcharged from all Services to the Crown, and from all other Duties but ſuch which they impoſed on themſelves in their Eccleſiaſtical Aſſemblies, Our Anceſtors had not the leaſt Suſpicion that an ill uſe would be made of thoſe vaſt Revenues whilſt in the Hands of the Clergy; and therefore an Alien might be preſented to a Beneſice which is a Freehold in Law, but a Lay Alien was not allowed to purchaſe any Freehold, *becauſe it was preſumed he would adhere to his own Country in time of War, in which this Nation was then frequently engaged.*

And as a farther Inſtance of that Eſteem which our Predeceſſors had for Men of this Order, if any of them had committed a Fault which deſerved any Publick Puniſhment, he

was never expoſed till degraded, and then he ſuffered not as a Clerk, but as a Layman.

But as 'tis uſual for Men *to run from one Extreme to another, ſo now we live in an Age where you who are the Prieſts of the* New Covenant *are in a worſe Condition than the* Nethinims *of the Old; you meet with* Philiſtines *every Day, who would have you, like* Sampſon, *grind in the Mill, but without taking Toll, theſe Men would have you to be the Miſſionaries of the* People, *and if their Power was equal to their Prejudice, they would make you Miniſters and Shepherds, not in the Metaphor, but in the Letter, or if you muſt exerciſe the* Miniſterial Function, *they would confine you to that ancient and cleanly Part of it in Scowring the Veſſels, and Sweeping the Churches.*

Theſe are the Men who are Born as the Wild Aſſes Colts, and yet would fain become Wiſe, *which they attempt by advancing their* Tinſel Reaſon *above* Revelation, *who in their* Wild Rapſodies *of a* Heated Converſation *admire the Modern* Spinoza *for that Blaſphemous Notion in aſſerting the* Holy Bible *to be a complete Syſtem of*

Re-

Religious Errors; *but if they had Leiſure from doing nothing, to read all the Books which either he or* Porphyry *before him have wrote againſt the Goſpel, they could never eſtabliſh* Irreligion *by* Argument; *'tis true, they might, like them make ſome vain Attempts againſt the Authority of the Scriptures, but to different Purpoſes: for* Porphyry *did it to advance the* Philoſophy *of the* Stoicks, *who placed their chief Happineſs in* Virtue, *but theſe Men expoſe* Religion *to ſecure themſelves from their own Guilt, and living in a ſettled Neglect of all* Divine Inſtitutions, *have not* Stoiciſm *enough to regard Virtue, either for the Advantages which attend it in this Life, or the Rewards in the next.*

And tho' ſome amongſt us who are not arived to ſuch open and profeſſed Impieties, may exert themſelves in very High Flights *for the Imaginary Good of the* Church; *yet if it had no better ſupport it would ſtand as tottering as the* Ark *of* God *did formerly in* Uzziah's *Cart; for rather than not to* make Proviſion for the Fleſh to fulfil the Luſts thereof, *they would turn the very* Churches *into* Taverns, *and like* Belſhaz-

zar, *drink Wine with their Concubines there.*

And yet such Men as these, who were Holy David's *Fools, must now by a fatal Mistake, be imagined the* Wits of this Age, *if that may be called* Wit, *which consists in Lampooning your Character, in declaiming against your Maintenance, in jesting you into a Contempt of the necessary Supports of your Lives, which they have told the World you should esteem as Types and Shadows, and abolish them with the Ceremonial Law: And,* Lastly, *by Rithming you into the Love of that Poverty which they hate above all things; thus the late famous* Laureat *tells you, That*

Your Saviour came not with a gaudy Show,
Nor was his Kingdom of this World below,
Patience in Want and Poverty of Mind,
Those Marks of Church and Church-men he design'd,
And Living Taught, and Dying left behind.
The Crown he wore was of the pointed Thorn,
In Purple he was Crucified not Born,
They who contend for Place and high Degree,
Are not his Sons, but those of *Zebedee.*

But

But a Wiſer Man than our Poet *hath told us, that tho' Wiſdom is better* than Strength, *yet a* Poor Man's *Wiſdom is deſpiſed, and his Words are not heard.*

'Tis true, if the World was made of pure and refined Vertue, this would be a glorious Example for you to follow, for then the Doctrine which proceeded from a Poor and Humble Prieſt, would have as great Efficacy on the People, as that which came from one cloathed in Purple and fine Linen.

But 'tis plain, that in the very Ruſt of an Iron Age, Men will be governed by Opinions, not always built upon juſt and regular Motives; that they will be influenced more by the Appearance than the real value of Things and Perſons; and then it muſt neceſſarily follow, that he who Officiates in Wretched Weeds will render his Performance as Mean and Contemptible as his Perſon; and that the People will not care how ſeldom they offer up Praiſes and Thankſgivings in thoſe Churches which are not beautified ſo well as their Ordinary Houſes, and where the Prieſt himſelf is ſo much out of Repair.

But what is worſe, where the Clergy have a Maintenance ſuitable only to their com-

mon Neceſſities, and not to their Dignity; in ſuch Caſe, the ſaying of Panormitan *will always prove true,* (viz.) Ad tennuitatem beneficiorum neceſſario ſequitur ignorantia Sacerdotum, *and where ſuch Shephards are, the Flock muſt needs go aſtray.*

And yet ſuch there are in many places which might occaſion the Archbiſhop of Spalato *to make that ſevere Reflection on us,* (viz.) *that he ſaw nothing reformed but our Doctrine, and a Learned* * *Prelate of our Church hath obſerved, that the ſlender Proviſion of many Miniſters is a Contempt upon Religion it ſelf, and an unanſwerable Prejudice to the Reformation.*

Now ſince many of you labour under ſome of theſe Difficulties, and ſince all your Diligence and Application both by Preaching and Writing can ſcarce give a Check to the Opinions and Practiſes of unreaſonable Men, or make any awful Impreſſions on them of that God whom 'tis their Advantage as well as Duty to obey, therefore that the Concerns of your Civil Rights might not too much di-

* Preface to Hiſt. Reform. 2 Pts.

vert you from ſuch difficult and uſeful Studies, I have collected all the Laws relating to thoſe Rights, and reduced them under proper Titles, that you may at one View Peruſe all that is pertinent to each Subject without buying or reading many Volumes in which they lay diſperſed.

Something of this Nature hath been already done by Sir Simon Degg, *and with great Judgment, ſo far as he hath gone, and ſince him by Dr.* Godolphin, *who being a Civilian himſelf, hath ſo blended the Civil Canon and Common Law together, that in his Book, there is an incoherent Mixture of all thoſe Laws, and 'tis a meer Tranſcript of many Common Law Caſes, without Order, Method or Application.*

It has been my care in ſome meaſure to ſupply the Defects of thoſe who have wrote on this Subject, and likewiſe to be ſerviceable to you whilſt you are carefully diſcharging your Duties in this World to make all of us happy in another.

And

And tho' ſuch your Endeavours may be reviled with the ſenſleſs Name of Prieſtcraft, yet 'tis not to be doubted, but that Power which heretofore enabled a few poor Fiſhermen to ſubdue a great part of Mankind to the Obedience of their Redeemer, will ſtill enable you to proceed in all things neceſſary to the great Charge committed to your Care, and as this may be a means to remove that Contempt and Scorn which ſome profligate Men have raiſed againſt your Perſons, *ſo it may be an effectual Method to preſerve the Church from Danger.*

It may be in Danger by Diviſions amongſt your ſelves, and yet even then God may ſhew it ſome particular Marks of his Favour, but it muſt be as Moſes *told the* Iſraelites, *not for the Righteouſneſs of her* Sons, *but for the Wickedneſs of her* Adverſaries.

Such Diviſions may ſhake the Foundations of a Church, tho' Built on a Rock, *and at laſt daſh it into pieces, this Danger we have once, and not many Years ſince, eſcaped; and if we do not grow wiſer by the Miſchiefs which were then in view, we ſhall neither be reſpected at home or abroad, which puts me*

in

in mind what a learned Prelate who was present at the Synod of Dort, *observed upon the Old Poet* Prudentius, *that he spoke like an* Oracle *in these Words:*

——Scissura Domestica turbat,
Rem cleri titubatq; foris qui dissidet intus.

Therefore 'tis to be wished that you may never be distinguished by Opprobrious Names or Characters, which in time may make the Church truly Militant, and then Religion may be in danger of being stormed out of the World, for as intemperate Zealots seldom give, so they cannot expect Fair Quarter.

'Tis likewise to be desired, that Moderation which hitherto hath been counted a Virtue, *may not lose that noble* Character *and be turned into a Name of* Reproach, *and that a well tempered Zeal for our* Religion *may not be branded with* Lukewarmness, *unless 'tis hot enough to scorch our* Charity, *which hath so long been esteemed a saving Grace, and which will ever continue one of the brightest parts of* Christianity

anity *that Unity, Love, and Meekneſs may never be forgotten to be the diſtinguiſhing Marks of the Chaplains of the* Prince of Peace; *that it was the* Dove, *and not the* Raven *which returned with an* Olive-leaf *in its Mouth; and* Laſtly, *That the peace of* Jeruſalem *may be duly conſidered, and always preſerved in the Chamber of that Name.*

N. B. The Authors living a great diſtance from the Preſs has occaſioned ſome Erratas in the following Book; which the Reader is deſired to mend.

Some

Some *BOOKS* Printed for, and Sold by, *Charles Harper*, at the *Flower-de-luce*, over againſt St. *Dunſtan's* Church, in *Fleetſtreet*.

Divinity and Miſcellanies.

THE Relative Duties of Parents and Children, Husbands and Wives, Maſters and Servants, Conſider'd; in Sixteen Sermons; with three more upon the Caſe of Self-Murder, in *Octavo*; by *W. Fleetwood*, now Lord Biſhop of St. *Aſaph*.

An Eſſay upon Miracles, in Two Diſcourſes; the ſecond Edition, in *Octavo*. By the ſame Author.

A plain Method of Chriſtian Devotion, laid down in Diſcourſes, Meditations, and Prayers, fitted to the various Occaſions of a Religious Life; Reviſed and Tranſlated from the *French* of Monſier *Jurieu*, in *Twelves*, by *W. Fleetwood*, now Lord Biſhop of St. *Aſaph*.

The Reaſonable Communicant: Or an Explanation of the Doctrine of the Sacrament of the Lords-Supper, in all its Parts, from the Communion Service, in a Diſcourſe between a Miniſter and one of his Pariſhioners, the fourth Edition, corrected by the Author, Price 1 *s*. *N. B.* This Book being very well approved of, is, at the Requeſt of ſeveral of the Clergy and others, Printed in a leſſer Character, for Cheapneſs, to thoſe that give Numbers away, (*viz.*) price 3 *d*. or one Hundred for 20 *s*.

The Hiſtory of the Old and New Teſtaments in Verſe; with three Hundred and Thirty Sculptures, in Three Volumes, Dedicated to her moſt Sacred Majeſty, Vol. I. from the Creation, to the Revolution of the Tribes, Vol. II. from thence to the end of the Prophets, Vol. III. Repreſenting the Actions and Miracles of our Bleſſed Saviour and his Apoſtles; by *Samuel Weſley*, M. A. Author of the Life of Chriſt, *Octavo*.

The Pious Communicant rightly prepared; or a Diſcourſe concerning the Bleſſed Sacrament, with Prayers and Hymns, ſuited to the ſeveral Parts of that Holy Office: To which is added, a Diſcourſe of Baptiſm, a Diſcourſe of Baptiſm, and a Letter to the Religious Societies; by *Samuel Weſley*, M. A. Chaplain to his Grace *John* Duke of *Buckingham*, and Marqueſs of *Normanby*; in *Twelves*.

The whole Duty of Man according to the Law of Nature, by that famous Civilian, *Samuel Puffendorff*, now made *Engliſh*; the third Edition, with Additions and Amendments, in *Octavo*.

The Hiſtorical and Miſcellaneous Tracts of the Reverend and Learned *Peter Helyn*, D. D. now collected in one Volume, and an Account of the Life of the Author, never before publiſhed, in *Folio*.

Reſolves: Divine, Moral, and Political, with ſeveral new Additions both in Proſe and Verſe, not extant in the former Impreſſions; by *Owen Feltham*, Eſq; in this Twelfth Edition, References are made to the Poetical Citations, heretofore much wanted, and the Language refin'd, now printed in *Octavo*.

Biſhop *Uſher's* Power of the Prince, and the Obedience required of the Subject, with a large Preface, by Biſhop *Sanderſon*. Octavo.

The third and laſt Volume of the Works of Mr. *Abraham Cowley*: being the Second and Third Parts thereof; adorn'd with Proper and Elegant Cuts, Part 2d. what was written and publiſhed by himſelf;

now

now reprinted together: The eighth Edition. Part the 3d. His first Books of Plants, the first and second of Herbs, the third and fourth of Flowers, the fifth and sixth of Trees: made *English* by several celebrated Hands, with necessary Tables, and Poems of eminent Persons, in praise of the Author, in *Octavo*, where the two first Volumes of the said Works are likewise sold.

The Lives of the Roman Emperors from *Domitian*, where *Suetonius* ends, to *Constantine* the Great; Dedicated to his late Majesty King *William*. *Octavo*; in two Volumes, by *J. Bernard*, M. A.

Arithmetick, or the Grounds of Art; teaching that Science, both in whole Numbers and Fractions, Theorically and Practically. Originally composed by Dr. *Record* and others: and now Corrected, new Methodized, and much Improved, and thereunto added a New Treatise of Decimals, with the Demonstration of each Rule, and the Relation it has to Vulgar Fractions, also why Decimals are wrought as whole Numbers, *&c.* by *Edward Hatton*, Philomercat, in *Quarto*.

LAW.

JUdge *Ventris*'s Reports, in 2 Vols. in *Folio*. 2d. Edit. with References.

The Lord *Cokes* Commentary upon *Littleton*, the 10th Edit. with large Additions, *Fol.*

Modern Reports 2d, 3d, and 4th Parts; being a Collection of special Cases adjudged in the Courts of Queen's Bench, Common Pleas, and Exchequer, in the Reigns of K. *Charles* 2d, K. *James* 2d, K. *William* 3d, and Q. *Mary*, carefully collected by a Learned Hand, in 3 Vols. *folio*.

Mr. Serjeant *Latwyche*'s Reports, and Entries, in two large Vols. in *folio*.

A new Book of Entries, compiled by *Hen. Clift*, and Published by Sir *Cha. Ingleby*, Kt. Serjeant at Law, *folio*.

The Office and Authority of a Justice of Peace, collected out of all the Books, whether of Common or Statute Law, hitherto written on that Subject, the second Edition with Additions, by *W. N.* of the *Middle-Temple*, Barister.

Style's Practical Register, begun in the Reign of King *Charles* I. Consisting of Rules, Orders, and the principal Observations concerning the Practice of the Common Law in the Courts at *Westminster*; particularly the King's Bench, as well in matters Criminal as Civil; the fourth Edition with large Additions, in *Octavo*.

School Books.

DR. *Littleton*'s Dictionary, in four Parts, *English* and *Latin*, and *Latin* and *English*, the fourth Edition in *Quarto*.

Coles's Dictionary, *English*, *Latin*, and *Latin*, *English*; the sixth Edition in *Octavo*.

Martialis Epigrammatum, in Usum Delphini, Octavo.

The *Pantheon*, representing the History of the Heathen Gods, the fourth Edition, *Octavo*, with Cuts of the Deities.

Gratii Falisci Cynegeticon, cum Poematio Cognomine, M. A. *Olimpii Nemisiani Carthaginensis Notis perpetuis, variis que Lectionibus adornavit Tho. Johnson*, M. A. *in usum Illustrissimi Ducis Gloucestriæ*, *Octavo*.

ABBIES.

ABBIES.

IT may ſeem unneceſſary to mention any thing under this Title, becauſe all Abbies, Priories, and other Religious Houſes of Monks and Fryars are now diſſolved, and their Poſſeſſions given to the Crown, and the Order of Abbots is wholly extinct.

But ſince the Eccleſiaſtical State of *England*, as it now ſtandeth, may be better underſtood by informing the Reader how it was before the Reformation; I thought it not impertinent to my preſent undertaking to give ſome Account of the Foundation and Endowment of Abbies and other Religious Houſes, the Means by which they afterwards acquired great Riches, and incidently of other Matters relating to this Subject till the time of their Diſſolution.

Abbies were certainly founded and endowed for Religious Purpoſes, and were Places where Holy Men retired from the buſie Affairs of the World, and there ſpent their time in Solitude and Devotion.

And at firſt, ſuch was the wonderful eſteem that both the Prince and People had of the Piety of thoſe Men, that it procured very large Privileges and Exemptions from the one, and immoderate Charity and Riches from the other; for tho' by the ancient * Common Law of *England*, a Man could not alien Lands which came to him by Deſcent without the concurrence of his Heir, yet he was allowed to give part of it to God; that is, to ſuch Perſons who were ſeparated and devoted to his Service, as Abbots and their whole Convents were then held to be: and beſides, it was a ſettled and cuſtomary Duty in thoſe Days, for every Man in the Pariſh, or within ſuch a Diſtrict, to give to the Church a certain meaſure of wheat every Year on St. *Martin*'s Day; and this in our ancient Books is called *Church-ſeed*.

* Glanvil, lib. 7. cap. 1. fo. 44.

But as theſe Abbies encreaſed in Riches, ſo the State became Poor; for the Lands which theſe Regulars poſſeſſed were *in mortua manu*, they could never revert or eſcheat to the Lord who gave them, and, ſuch was the blindneſs of that Age, that they were exempted from Knights Service, and all other Temporal Services for the defence of the Kingdom.

It was for this Reaſon that (*b*) Laws were afterwards made to prohibit Gifts to thoſe Religious Houſes, and my Lord *Coke* tells us, that ſeveral Lords at the creation of the Seigniory had a Clauſe in the very Grant, that the Donor might give or ſell his Land to whom he would, *Exceptis viris Religioſis & Judæis*; ſo that theſe religious Men were put under the ſame Incapacity with the *Jews*, who were Enemies to the Chriſtian Religion; and well they might, for they were then degenerated from that ſtrictneſs and ſeverity of Life, for which their Predeceſſors were ſo much admired; and as if the Confluence of ſuch large and ample Endowments and Riches was not enough to ſupport them in a luxurious courſe of Life, they were ſtill contriving to get more, and to evade thoſe Laws which ſtood in their way, as for inſtance:

The firſt Statute againſt *Gifts* in *Mortmaine*, did not do them much hurt, for they always emploied the moſt cunning and learned Men in the Law, and my Lord (*c*) *Coke* commends them for it, but what was it to do? Why, It was to find out ways to creep out of the Statute, for that prohibited only *Gifts* to Religious Houſes, and therefore notwithſtanding that Law they obtained *Long Leaſes* of Lands which could not be comprehended under the Word *Gifts*.

But then by another Statute, 7 *Ed.* 1. they were prohibited, that *nec arte vel ingenio terras vel tenementa ſibi appropriare præſumant*, and this was under the Penalty of forfeiting ſuch Lands, but this Law extending only to Gifts, Alienations, and other Conveyances *made to the Parties*, did not comprehend Lands which were *recovered* by a legal courſe of Law, and therefore they would bring a *præcipe quod reddat* againſt the Tenant, and would get him by Colluſion to make Default, and thereupon a Judgment was obtained to recover the Land, which was entred accordingly; and when this Contrivance was found out and prohibited, then they invented Feoffments to Truſtees and their Heirs, for the uſe of them and their Succeſſors, and this was afterwards adjudged to be *In mortua manu*.

(*b*) Magna Charta, cap. 36. (*c*) 2. Inſt. 75.

I only

I only mention theſe things, to ſhew that theſe Orders of Men did not altogether ſpend their time in Devotion and in the Service of God, but in conſulting with the ableſt Lawyers to evade thoſe Laws which were made againſt their Temporal Intereſt, and by this Means they got the beſt part of the Lands of *England* into their Poſſeſſion.

And now their Houſes, which were built *In laudem & honorem Dei*, were converted into Nurſeries of Licentious People, who, by Cheats and Impoſtures and other Miraculous Whimſies had drawn all ſorts of People thither in Pilgrimages; from whom they got all they had in this World, to ſecure a ſafe and quiet Paſſage for them into the next; and thus they continued for many Ages till the Reign of *H.* 8.

'Tis probable that King intended only at firſt to reform theſe Abuſes, and not totally to diſſolve the Houſes, but they choſe rather to Rebel then Reform, for about two Years before he appointed any Viſitation of theſe Regulars, there were two Rebellions; one in *Lincolnſhire* headed by a Churchman, but diſguiſed in the Habit of a Cobler, and directed by a Monk; the other in *Yorkſhire*, where one *Ask* was their Captain, and this was called, *The Pilgrimage of Grace*; for ſome Prieſts marched before the Rebels with Croſſes in their Hands, and Crucifixes in their Banners.

But theſe Rebellions being ſuppreſſed, the King about the 28th Year of his Reign appointed Viſitors to inſpect all the Abbies, and to examine every thing which related either to their Converſation or Superſtitions, and to report it to the Lord Vicegerent *Cromwell*.

But if the King did always intend a Diſſolution of theſe Bodies of Men, it was now the more eaſily to be effected, for ſome of the Abbots had been guilty of comforting and aſſiſting the Rebels, and others were convicted of Diſorders by the Viſitors, and thus moſt of them perceiving their time of Diſſolution drawing near committed great Waſts, ſo that by theſe Motives they were induced to *Reſign* their Houſes to the King, that they might have a better Title to Penſions during their Lives.

It was by theſe Reſignations that the Houſes and Lands of the Abbots became veſted in that King, which were afterwards granted by him to the People, under which Grants they are enjoyed to this Day.

Some Writers in the late Reign of King *James* II. gave the preſent Poſſeſſors a very large aſſurance of their Titles, ſo that they would not be in any danger of loſing their Lands, if

Popery ſhould have been eſtabliſhed here, becauſe the Pope himſelf had granted a Diſpenſation in this Caſe, with a *non obſtante* to the Canon Law.

However this was not much regarded, for the Plenitude of the Popes Power is ſo extenſive, that it may be a Queſtion (where that prevails) whether it can be bound by any Acts of his Predeceſſors.

'Tis true we were then told that what was done by any former Pope, could not be well revoked at that time, which is as much as to affirm that it might be done when Opportunity ſerved.

But the preſent Poſſeſſors have a better Title to thoſe Lands than the Popes Diſpenſation can give them; for, as I have mentioned, moſt of them were ſurrendred to the King by the Abbots and Convent themſelves, and theſe Surrenders were all confirmed by Act of Parliament.

The Penſions of thoſe Abbots who ſurrendered were proportioned to their Crimes or Innocence, but the Monks were allowed not exceeding Eight Pounds during their Lives, or until they ſhould be provided with Livings, which they were certain to have upon every Vacancy, becauſe thoſe who purchaſed the Abby Lands of the King were to pay theſe Penſions to the Monks out of the Rents of the ſuppreſſed Monaſteries, and to eaſe themſelves of that Charge, the Purchaſers were very induſtrious to provide Livings for them.

But this was a wrong ſtep to Reformation, becauſe the greateſt part of the Clergy were (by this means) ſuch who had been formerly ignorant Monks and Fryars, which Sett of Men were not worn out till the Reign of Queen *Elizabeth*, and then thoſe of better Education were placed in the Churches.

It has been often inſinuated as a reproach to that Reign in which theſe Monaſteries were ſurrendred, that it was a robbing of God, and that it was a covetous deſire of their Riches which made the King ſo intent upon the Reformation.

In anſwer to this, I muſt admit that Churchmen ought to have ſuch a Subſiſtence which may ſecure them from all Secular Cares, and from that contempt which is always incident to Poverty.

They ought likewiſe to have ſufficient for charitable Uſes, and to ſupport Hoſpitality, for by this means they win and engage the Affections of their People.

But when they graſp after great Riches, when by Pious Cheats they had fraudulently obtained from an ignorant and unthinking Laity the greateſt part of their Poſſeſſions and Riches, and when thoſe Riches were ſeldom or never applied to any religious Purpoſes, then it became the Intereſt of the Nation in general, and of the Government it ſelf to reaſſume thoſe Lands, which had ſo long continued uſeleſs to the ſupport of the one, or defence of the other.

The Hiſtories of thoſe times inform us that the Abbots became rich by falſe Opinions and notions of Purgatory impoſed on the People, by Relicks, Maſſes, and other ſuperſtitious Solemnities, and, what is worſt of all, by the Spoil of the Church it ſelf; for both the great and ſmall Tythes which belonged to the Secular Clergy (that is to Parſons) were in many Places taken from them, and by the Popes Authority given to and veſted in the Monaſteries, and the Abbots allowed thoſe who ſerved the Cure but ſmall Stipends, and, where they were moſt liberal, it was only to permit the Poor Vicar to have the ſmall Tythes.

But it is natural to Mankind to be always in Extreams, for when theſe Abbies were diſſolved, and all the old Monks Dead or provided with Livings, ſo that their Penſions ceaſed thoſe who purchaſed their Lands of the Crown, had them charged with no other Incumbrance, but with that poor Stipend which the Abbot had given to thoſe who officiated at the Altar, and which as the learned Biſhop of * *Sarum* rightly obſerves, is not a competent Maintenance for a Clergyman now, for it would ſcarce ſupport a ſingle Man then, without the additional Helps of Fees for Obits, Exequies, Maſſes for poor Mens Souls (for the Abbots themſelves had the Profits from thoſe that died rich) and ſuch other Perquiſites, all which are now gon, and nothing in the room; ſo that the Clergy in many places have a very narrow Subſiſtence, which certainly makes them ſubject to want, and by conſequence to Contempt; and this he tells us was the greateſt Miſchief which befel the Church at the Reformation, that there was not a better Proviſion then made for the Clergy.

'Tis true this was not only a great but a very unequal Change, for Men who lived in the greateſt Eaſe and Plenty, to ſubſiſt upon a Penſion of 8 *l. per Ann.* for none of the Monks had more, and all of them could not be provided with Livings: for Men who to diſtinguiſh them-

* Preface to 2. Vol. of Hiſt. of Reform.

ſelves from the reſt of the Eccleſiaſticks, were called Regulars, becauſe they did or ſhould live under certain Rules of Government in their Houſes; I ſay for theſe Men to be blended amongſt the Laity, and ſpend the reſt of their Days in a poor and neglected manner, for theſe Men who had the Honour to ſee the Heads of their Houſes *mitred*, and exempt from the Juriſdiction of the Biſhop, by particular Grants from Kings, as *Abingdon* by King *Kenulph*, *Battle* by *William* the Conqueror, *&c.* and not only ſo, but to exerciſe Epiſcopal Authority within their own limits, and who were Lords of Parliament themſelves; and likewiſe to ſee the very ſame Perſons ſtript of all thoſe Privileges and Preferments, and to live many Years afterwards leſs regarded than the Porters of their Abbies before the diſſolution, and what is ſtill worſe, to entail Poverty upon moſt of the Vicars of this Kingdom.

I grant there were no fixed number of thoſe Abbots who were Lords of Parliament, but there were always ſome; in 43 *H.* 3. there were 102 Abbots and Priors ſummoned to Parliament, in the Reign of *Ed.* 1. and *Ed.* 2. there were 50 and ſometimes 80 and more, that the number of Regulars might come nearer to the number of Seculars, not that they eſteemed it any great Honour to be ſummoned by a Layman tho' a King, for their obedience was due only to the Pope, and therefore we have Inſtances when they refuſed to attend the Parliament upon the King's Summons.

And it hath been a Queſtion, that when they did ſit there, whether it was as part of the Eccleſiaſtical State, or as holding their Lands of the King *per Baroniam.*

In anſwer to which, I find that under all the *Engliſh Saxon* Kings, they held their Lands in Frank Almoigne, and then they ſate there in their Spiritual Capacity.

But King *William* the Conquerour, to keep them a little cloſer to his Service, altered that Tenure, and appointed that they ſhould hold of him *per Baroniam*: and my Lord (*a*) *Coke* tells us, that of thoſe Abbies which were of the King's Foundation, and which were held of him *per Baroniam*, the Abbots, by vertue of that Tenure, had a Right to be Summoned to Parliament, and were Lords of Parliament.

And this is confirmed by the Charter of Exemption (*b*) of the Abbot of St. *Auguſtine* in *Briſtol*: for the Writ ſets forth that the Abbot complained that he was ſummoned to Parliament, *Licet ipſe non tenet per Baroniam ſeu aliquo alio modo in*

(*a*) 2. Inſt 3.

(*b*) Prynn. on 4. Inſt. 335.

Capite,

Capite, nor that his Houſe was of any Royal Foundation, *Per quod de veniendo ad Parliamentum de jure Summoneri debeat.*

So where the Abbot of *Fairplace* complained of the like Summons, (*c*) when he held all his Lands, *In pura & perpetua Eleemoſyna & non per Baroniam aut alias in Capite per quod ad Parliamentum Summoneri non debeat.*

And (*d*) Mr. *Selden* is of Opinion, that where it, appeared that the Abbot *nihil tenuit de Rege*, that was a ſufficient Reaſon why he ſhould not be ſummoned.

'Tis true ſeveral Abbots, who did not hold *per Baroniam*, were ſummoned to Parliament upon extraordinary Occaſions, in ſeveral Reigns after the Conqueror, but this was not *de jure*, it was only for their Advice and Aſſiſtance upon preſſing Circumſtances, but thoſe who held *per Baroniam*, were Lords of Parliament, and had a right to be Summoned, and ſit with the reſt of the Peers.

Of theſe ſome are of Opinion that there were 26, my * Lord *Coke* tells us they were 27, but * the Biſhop of *Sarum* mentions 28, at the time of the Diſſolution.

Abingdon,
St. *Albans*,
St. *Auſtin*, *Canterbury*.
Battle,
St. *Bennet*,
Berdeny,
Cirenceſter,
Colcheſter,
Coventry,
Croyland,
St. *Edmondsbury*,
Eveſham,
Glaſtenbury,
Gloucester,
Hide,
Malmesbury,
St. *Mary*, *Yorke*,
Peterborough.
Ramſey,
Reading,
Selby,
Shrewsbury,
Taviſtock,
Tewksbury,
Thorney,
Waltham,
Weſtminſter,
Winchcomb.

To conclude this Title, it may not be improper to ſhew what Difference the Law made in ſome particular Matters relating to Abbots and other Secular and Religious Perſons before the Diſſolution.

The property of the Goods of the Abby was in the Abbot during Life, but after his Death then it was in the Houſe, and this was the Reaſon that at Common Law if ſuch Goods were taken away in the Life-time of the Abbot, his † Succeſſor could not have an Action of Treſpaſs, for by the taking the Property was Diveſted.

(*c*) Prynn. ib. 335. (*d*) Seld. Tit. Hon. 730. * 2. Inſt. 585. * Hiſt. Reform. 267. † 9 H. 6. 25.

This was remedied by the Statute of *Marlbridge*, by which it was provided that the Succeſſor might declare *quare bona & catalla Domus & Eccleſiæ ſuæ tempore R Prædeceſſoris ſui cepit*, &c. which the Succeſſor of a Biſhop, Dean, or other Secular Eccleſiaſtick cannot do, becauſe there is an Alteration in the Church, by the Death of thoſe Perſons; but there was none by the Death of an Abbot, for the Houſe continued ſtill the ſame, and therefore the Abbot might have an Aſſize for a Diſſeiſin, or an Action of Waſt, for any Waſt done in the Life of his Predeceſſor; which a ſucceeding Biſhop, or a Dean, cannot now have for the Reaſon abovementioned.

But the Abbot was only capable of taking a Feoffment, it could not be made to him and his Convent, for they were dead Perſons in Law.

Abjuration.

THIS is where a Man committed Felony, and for the Safety of his Life fled to ſome Church or Church-yard, and there, before the Coroner, within 40 Days, confeſſed the Fact, and took an Oath to be baniſhed perpetually from his Native Country, but not to a Country of Infidels; and this was called Abjuration.

It was founded upon the Privilege of Sanctuary; for the Church-men, in thoſe Days, had not much Regard to the Properties of Men; for if Goods were ſtolen, *Et reus ad Eccleſiam confugiſſet vitam habeat*; that was the Doctrine at that Time, yet they were very careful of their own Goods: For if a Man had committed Sacrilege, he could not have any Privilege of Sanctuary, and therefore could not abjure, but was hanged.

By the Statute, 1 *Jac.* 1. this Privilege of Sanctuary and all its Dependencies were wholly aboliſhed; ſo that Abjuration, founded upon that Privilege, is quite gone.

But Abjuration upon the Statute (*e*) 35 *Eliz.* for not coming to Church within three Months after Conviction, was lately in force, till that Penalty was likewiſe taken away by a late Act (*f*) of Parliament, upon taking the new Oaths, and Subſcribing the Declaration therein mentioned.

Yet there are ſome other Abjurations ſtill in Force, and

(*e*) 35 Eliz. cap. 1. (*f*) 1 Willi. cap. 1.

thoſe

thoſe which relate to Clergymen, as by the Statute (*g*) 25 *Car.* 2. all Perſons who are admitted into any Office, *Civil or Military*, muſt take the Teſt, which is an Abjuration of ſome Doctrines of the Church of *Rome*, but Eccleſiaſtical Offices are diſtinguiſhed from the Civil, and as ſuch cannot properly be called Military; and therefore Parſons and Vicars are not within that Act, and by Conſequence not bound to take that Oath.

But the Caſe is not the ſame with Biſhops and dignified Church-men, for they are within the Act, becauſe they have a *Civil* Juriſdiction and Authority, annexed to their Offices, by keeping Temporal Courts, by Licenſing Phyſicians, and Probates of Wills.

There is likewiſe another Oath of Abjuration, (*h*) which Clergy-men are expreſly enjoined to take, and that is to abjure the Prince of *Wales* within three Months after they are inducted to any Benefice; and this may be done either in the Courts at *Weſtminſter*, or at the Quarter-Seſſions, where they reſide.

Abſolution.

'TIS very certain that our Saviour left Power in his Church to abſolve Men from their Sins; but this was not an abſolute and inconditional Power, veſted in any of his Miniſters, but it was founded upon Repentance, and upon the Penitent's Belief in him alone.

Theſe are the Conditions of Abſolution, which is not a Pardon as proceeding from the Lips of the Prieſt; for what is done by him is only Declaratory of a Pardon from God, to him who truly repents and believes; for where God doth not abſolve, the Prieſt cannot.

Therefore 'tis a ſenſleſs Inſinuation which Men make againſt the Clergy, as if they were ſo vain, as to think they had Power in themſelves to abſolve Men from their Sins, when they have no manner of Power in ſuch Caſe, but what proceeds from Faith and Repentance.

'Tis true, the Words, by which this is done, are Words of Authority, (*viz.*) I abſolve thee, *&c.* The old Way of Abſolution was by Prayer and Impoſition of Hands; but that was diſuſed about the Beginning of the 12th Century, and

(*g*) 25 Car. 2. cap. 2. (*h*) 13 W. 3. cap. 6. 1 Anno. 22.

the

the new Method introduced under thoſe authorative Words; and becauſe the natural Import of ſuch a poſitive Sentence might lead Men into an Opinion, that the Clergy aſſumed a Power of pardoning Sins, therefore it was always tempered with ſome ſofter Expreſſion, (*viz.*) I abſolve thee, in ſo far as 'tis granted to me, or as far as the Accuſation comes from the Penitent, *&c.*

In former Days the Pope alone aſſum'd this Power of Abſolving, *&c.* which *Wickliffe* oppoſed here, by alledging that it was in every Prieſt; and one of the Articles which the Pope ſent to our King *R.* II. complaining againſt that good Man, was, that he had aſſerted *Hoc debet credi Catholice, quod* (*i*) **Quilibet Sacerdos** *rite ordinatus habet poteſtatem ſufficientem quemlibet* **Contritum** *à paccato quolibet abſolvendi*; where the Word *Contritum* ſeems to be the Foundation of Abſolution, for without Repentance there can be no Pardon.

'Tis true, Abſolution is uſually given to dying Perſons, who have but a little time to repent; and in ſuch Caſe there may be ſome Difficulty how the Miniſter ſhall be ſatisfied, that the Faith and Repentance of an expiring Sinner is ſincere, and how he ſhall know that 'tis accepted, in order to the Remiſſion of his Sins; for if the Miniſter is not ſatisfied in theſe Particulars, he hath no Authority to apply the Promiſes of Grace and Salvation to the dying Perſon.

All that can be ſaid in this Caſe, is, That after the Miniſter hath ſolemnly addreſſed himſelf to God, in Prayers, and particularly upon this Occaſion; he ought afterwards ſeriouſly to apply himſelf to the Penitent, and to examine him concerning his preſent State and Condition; and if he find that his Conſcience is touched with a Senſe of his Sins, then he ought to encourage him in the Progreſs to a ſincere Repentance; and when all that is done, he muſt leave the Succeſs, where infinite Mercy is to be found.

Therefore thoſe Miniſters, who in *April*, 1696. abſolved Sir *John Friend*, and Sir *William Parkyns*, at the Place of Execution, were juſtly cenſured, by the Governours of the Church, to be both inſolent and irregular in that Act, becauſe the dying Perſons were not moved by them to make any Confeſſion of their Sins, or at leaſt of that Sin of High-

(*i*) Prynn. on 4. Inſt. 224.

Trea-

Treaſon, for which they were to ſuffer; for they were ſo far from believing it to be a Sin, that they expreſſed a Satisfaction to die for it, therefore they could not repent, or deſire Abſolution in ſuch Caſe; ſo that Abſolving then was not only a Juſtification of that Crime, for which they were condemned; but a bold Affront, both to the Laws of the Church and State.

Abſtinence.

I think nothing hath been more abuſed than this Vertue of Abſtinence, which is recommended to us by the Church, and which we ought to obſerve, ſo far as it tends to depreſs any inordinate Appetite, and make it more ſubſervient to the Purpoſes of Religion.

'Tis this, and only this, which may be truly called a religious Abſtinence, for it humbles our vicious Natures, and by that means raiſes our Minds to a due Senſe of Prayer and Devotion.

But there is another Sort of Abſtinence, which is called *Ritual*, and which conſiſts only in abſtaining from particular Meats, at certain Times and Seaſons; and this is preſcribed as a Task, which we muſt undergo, to expiate our Sins, when at the ſame time we are allowed to indulge our Appetites with all manner of delicious Wines, and with any other nouriſhing Meats, but thoſe which for that time are prohibited.

So that this *Ritual Abſtinence* is a mere Mockery put upon Religion; it cannot be any manner of Pennance, and yet 'tis believed to be ſo, and to be compleated too, when the Faſting (as they call it) is over.

But certainly Men muſt have a very ſlender Opinion of their Sins, when they can believe they are ſo eaſily expiated; not by any ſevere and afflicting Abſtinence, which may mortifie our Natures, and make us more intent upon religious Duties, but by drinking the moſt pleaſant Wines, and feeding upon all other Delicacies, which either Art or Nature can provide for us.

This merry and pleaſant ſort of Abſtinence, being ſo widely different from that which was inſtituted by the Church, in the primitive Times, and ſo agreeable to our natural Inclinations, muſt neceſſarily expoſe the other to Scorn and Contempt; and thoſe who deſpiſe the Inſtitutions of the

the Church, have always very mean Notions of Religion, and are bold and ignorant enough to deſpiſe even God himſelf.

It was the Spiritual Monarch of the *Weſtern* World, who introduced this *Ritual Abſtinence* amongſt the People, who at firſt attempted only to govern the *Eccleſiaſticks* by his Law called the *Decretals*, which were publiſh'd here in the Reign of King *Stephen*; but afterwards he brought the Laity under certain Laws and Rules, and particularly under thoſe of Abſtinence, which were then called *Rogations*; but ſo groſly abuſed from the true Deſign and Nature of Faſting, that a certain Biſhop of *France*, in Imitation of the Pope, inſtituted certain Days of Abſtinence, as Sir *Henry Spelman* tells us, which were to be a Sovereign Remedy to cure the *French Pox*; and it was to be performed, by walking about 37 Miles, in middle *Lent*, to the Church of St. *Julian* the Martyr, and ſinging there, but how long he doth not mention.

Admiſſion.

THIS is when the (*k*) Biſhop, upon Examination of the Clerk, admitteth him to be able to perform the Office of a Prieſt, and 'tis done in theſe Words: *Admitto te habilem, &c.* and 'tis the Opinion of very learned Men, that this Right of Admiſſion was veſted in Biſhops ever ſince Chriſtianity was received in this Nation.

Under this Title, I think it proper to mention,

(1.) The Qualifications of the Clerk who is to be admitted.

(2.) What the Canons require of a Biſhop relating to the Admiſſion.

(3.) And laſtly, what are good Cauſes, why the Biſhop ſhould refuſe to admit, and what not.

And firſt, as to the Qualifications of the (*l*) Clerk, he muſt be 23 Years old, and a Deacon, before he can be admitted to any Benefice with cure.

Such Deacon muſt publickly read the 39 Articles in the Pariſh Church to which he is admitted, and declare his Aſ-

(*k*) 2. Inſt. 344. (*l*) 13 Eliz. cap. 12.

ſent

ſent thereunto, and muſt ſubſcribe the ſame in the Preſence of the Ordinary.

A Prieſt muſt be 24 Years old before he can be admitted to preach, or to adminiſter the Sacraments; and he muſt bring a Teſtimonial of Four Perſons, known to the Biſhop, of his Life and Doctrine, and muſt be able to give an Account of his Faith in *Latin*.

Beſides, no Perſon is to be admitted into a Benefice with Cure, *&c.* of 30 l. *per. Ann.* And in the Queen's Books, unleſs he is a Batchelour in Divinity, or a Preacher lawfully allowed by ſome Biſhop, or one of the Univerſities, and all Admiſſions to the contrary are void.

There are ſome Canons which relate to this Matter, which were confirmed by Letters Patents of King *James* I. which are as follows.

The 33d Canon takes Notice that it was long before that time provided by the Decrees of the Church, and the ancient Fathers, that none ſhould be admitted to the Order of a Deacon, or Prieſt, who had not ſome certain Place where he might officiate, and in Conformity to thoſe Decrees that Canon requires,

That no Perſon ſhall be admitted into Orders, except he produce a Preſentation to the Biſhop of ſome Eccleſiaſtical Living, then void in his Dioceſs, or bring a Certificate that he is provided of ſome Church, or of ſome Miniſter's Place vacant, either in a Cathedral, or Collegiate Church; or that he is Fellow, or Chaplain in ſome Colledge, either in *Oxford* or *Cambridge*; or Maſter of Arts of Five Years ſtanding in the Univerſity, and living there at his own Charge; or unleſs the Biſhop himſelf ſhortly intends to admit him to ſome Benefice, or Curacy.

Under theſe Qualifications, and theſe Terms, a Perſon may be admitted to a Living; and there is a Penalty inflicted upon the Biſhop, for admitting any one contrary to this Canon; and that is, to maintain the Perſon ſo admitted, until he prefer him; which if he refuſe, he may be ſuſpended by the Arch-biſhop, being aſſiſted with another Biſhop, from giving Orders for a whole Year.

By the 34th Canon, the Biſhop is prohibited to admit any Perſon into Orders, if he doth not dwell in his own Dioceſs: 'Tis true, he may admit one who lives in another Dioceſs; but then ſuch Perſon muſt be of one of our Univerſities, or he muſt bring Letters dimiſſory from the Biſhop, in whoſe Dioceſs he lives, or a Teſtimonial of his good Life and

Con-

Converſation, under the Seal of ſome College of one of the Univerſities, or of Four Miniſters, together with the Subſcription and Teſtimony of other credible Perſons, who have known the Perſon for 3 Years.

By the 35th Canon the Biſhop is to examine the Clerk before Admiſſion; but if he is admitted without any Examination, either by the Biſhop, or by 3 Miniſters appointed by him, in ſuch Caſe the Biſhop may be ſuſpended by the Arch-biſhop, as aforeſaid, from conferring Orders for 2 Years.

Admiſſion is therefore no more than an Allowance, or Approbation of the Biſhop, that the Clerk preſented to him, is capable of performing his Office; and becauſe the Law hath made him a Judge of the Capacity and Fitneſs of the Perſon, therefore an Action on the Caſe will not ly againſt him, if he refuſe to admit him thus qualified, according to the Canons, but the Remedy was by the Writ, *Quare non admiſit*, or *ad admittendum Clericum*, which may be brought in that County (*m*) where the Refuſal was, and not where the Church is, becauſe the Refuſal is the Ground of the Action.

But the Clerk could not be admitted, if he obtained Judgment, becauſe Damages were only to be recovered in theſe Actions.

Now the firſt of theſe Writs was never brought, but when the Advowſon was recovered, upon a Writ of Right of Advowſon, and then the Biſhop had refuſed to admit, and the other was always brought after the Plantiff had recovered the next Preſentation, upon an Aſſize of Darreign Preſentment, which Proceedings are now antiquated, and a quicker Remedy by *Quare impedit* is now in uſe.

Now as the Law hath given the Biſhop Power to admit under theſe Qualifications, ſo it hath prohibited him to admit (*n*) *Aliens* and *Frenchmen*; the Reaſon may be, as my Lord *Coke* obſerves, upon the Statute *De aſportatis Religioſorum*, becauſe *Aliens* and *Frenchmen* had got the greateſt Part of the Poſſeſſions of the Kingdom, and this might be a Reſtraint upon them from getting more.

But ſome are of Opinion, that theſe Statutes mentioned in the Margin, being made in Time of War between theſe Nations, are not in Force, at this time, for we ſee *Aliens*

(*m*) 7 Rep. 3. 2. Inſt. 583.

(*n*) 3 R. 2. cap. 3. 7 H. 4. cap. 12. 1 H. 5. cap. 7.

are

are admitted to Benefices. And tho' my (o) Lord *Coke*, upon Conſideration of thoſe Statutes, was of Opinion, that they ought not to be admitted; yet in *Calvin*'s Caſe he tells us, that not only an *Antenatus* born in *Scotland*, before the Union; but an *Alien*, born in *Spain*, is capable of a Benefice in *England*, and may maintain an Action for any thing concerning the Poſſeſſions of the Church, as Priors (p) *Aliens* might have done, becauſe the Action is not brought in his own Right, but in his Politick Capacity, and in the Right of the Church.

Now if he is capable of a Benefice, I ſee no reaſon why the Biſhop ſhould refuſe to admit an *Alien*.

'Tis true, no Action on the Caſe lies againſt the Biſhop, for refuſing to admit, for the Reaſon abovementioned; but if he admits, and the Arch-deacon refuſes to induct, an Action on the Caſe lies againſt him, becauſe Induction is a temporal Act.

This was made a Queſtion by *Fitzherbert*, (q) becauſe the Arch-deacon might have ſomething to alledge for his Refuſal, which might be cognizable only in the Spiritual Court, but 'tis not doubted now, but that ſuch an Action will lie; and I ſee no reaſon why it ſhould not, as well as an Action againſt a Sheriff, for refuſing to give Poſſeſſion upon an *Habere Facias Poſſeſſionem*, for in this Reſpect an Arch-deacon may be called an Eccleſiaſtical Sheriff.

I ſhall now ſhew what hath been allowed by our Law to be good Cauſes, for a Biſhop to refuſe Admiſſion to a Clerk preſented by the Patron.

And firſt 'tis generally held, (r) that whatever are good Cauſes of Deprivation, are likewiſe ſufficient Cauſes to deny Admiſſion, as Incontinence, Illiterature, Perjury, Heretick, Baſtard, Outlawed, Drunkenneſs, a Layman, *&c.* all which you may ſee more at large in Title *Deprivation*.

In 39 Ed. 3. 1, & 2. the Biſhop refuſed to admit, and in a *Quare impedit* brought againſt him, he pleaded that the Clerk was *Perſona inhabilis* to have a Benefice.

In the very next Year another Biſhop (s) pleaded to the like Action, that the *Preſentee* was not ſufficiently lettered, and *ea ratione inhabilis*, and both theſe Pleas were allowed to be good, tho the Matter was very general.

(o) 4. Inſt. 338. (p) 1. Inſt. 129. (q) N. B. 47. (r) 2. Inſt. 631. (s) 40. Ed. 3. 25.

So

So (*t*) *Perſona in literatura minus ſufficiens ſeu habilis ad habend' aliquod beneficium Sanctæ Eccleſiæ*;

So is *Criminoſus* generally *& non de ſana Doctrina.*

So is *Perjurius*, Paſ. 6 *Eliz.* Rot. 714. *Paſchal verſ. Ep'um*, London.

So is *Simoniacus*, (*u*) tho in Relation to any former Benefice, and not to that which he deſires now to be admitted.

So in a very late Caſe (*x*) the Biſhop of *Exceſter* refuſed to admit a Parſon to a better Living, becauſe he was *in Literatura inſufficien. & ea ratione inhabilis, & minime idoneus ad habend. Eccleſiam cum cura animarum.*

'Tis true, the Courts in *Weſtminſter-Hall*, held this to be incertain, and to be a very looſe way of pleading, and therefore gave Jugment for the Plaintiff, in the *Quare impedit*, which was affirmed upon a Writ of Errour in the Queen's Bench, but the Judgment was reverſed in the Houſe of Peers.

So that all theſe Cauſes abovementioned, are now good Cauſes of refuſal to admit a Clerk to a Benefice, and they are ſuch which relate to his Perſon; but if there is no Incapacity in the Preſentee, the Biſhop may refuſe to admit him, for ſome Cauſes relating to the Patron, as if he is excommunicated, *&c.*

So if there are Three Jointenants of an Advowſon, (*y*) or of the next Avoidance, and Two of them preſent a Clerk to the Biſhop, he may refuſe to admit him till they all joyn in the Preſentation, unleſs theſe two preſent the third Jointenant, and then the Biſhop muſt admit him, becauſe he may relinquiſh his Title, and he cannot joyn with the other two, in order to preſent himſelf.

But theſe Cauſes following are not ſufficient for the Biſhop to refuſe the Clerk, as to alledge that he is a Frequenter (*z*) of Taverns, or a Player at unlawful Games, becauſe theſe Acts do not make the Man *Criminoſum*, they are only *Mala prohibita* to ſome Perſons, and at certain Times, but are not *Mala in ſe.*

The Biſhop refuſed to admit a Clerk, (*a*) becauſe he was *Schiſmaticus inveteratus*; this was held to be incertain, and that he ought to ſet forth the ſpecial Cauſe; for if Schiſm is

(*t*) 15 & 16 Eliz. Rot. 1941. Molineux verſ. *Arch biſhop of* York. Hill. 6 Eliz Rot. 646. Bodenham verſ. Ep'um Hereford. (*u*) 2 Rol. Abr. 356. (*x*) Hill. verſ. Ep'um Exceſter *Caſes* adj. 88. (*y*) 26 Rol. Abr. 355. (*z*) Dyer 254. 2 Rol. Abr. 355. (*a*) 5 Rep. 58. Specot's *Caſe.*

a Breach of that Communion, wherein a Man might have continued without Sin, then 'tis grounded upon ſome particular Opinion or Notion to the contrary, which might have been ſet forth, that the Party might traverſe it.

'Tis no Cauſe * to refuſe a Man becuaſe he hath another Benefice, for that is at his own Peril; but in ſuch Caſes the Second is uſually better than the Firſt, which the Parſon accepts, and ſo the Firſt is void.

Adultery.

THIS is *Illicitus concubitus conjugati & conjugatæ.*

'Tis an Offence both againſt the Laws of God and Man, but 'tis generally eſteemed to be a Spiritual Offence, not from its Nature, for 'tis no more a Spiritual Crime than Murder, for both are Offences againſt the ſecond Table; but from the Quality of the Perſons who are made Judges of it, and thoſe are Biſhops who obtain'd this Juriſdiction after this manner.

When Emperours became Chriſtians, thoſe Biſhops who were inſtrumental to their Converſion, from *Paganiſm*, were in ſo great Reverence, that they granted them a Power of Judicature in certain Caſes, whereof Marriage was one; becauſe that was always ſolemnized in the Face of the Church, where the Biſhop or his Miniſters did preſide.

And becauſe matrimonial Cauſes were ſubject to their Juriſdiction, it ſeemed reaſonable that the Violation of Marriage ſhould be ſo too.

But the Biſhops, (*a*) for a long time, did not govern themſelves in this Matter, according to the Canons of the Church, but purſuant to the Rules of the *Imperial* Law; and this appears by the Puniſhment of this Offence, which hath been changed according to the different Laws and Cuſtoms of Nations, which I ſhall but juſt mention.

By the *Levitical* Law, both the Man and Woman were puniſh'd with Death; and ſo it was by the Civil Law; but afterwards the Puniſhment of the Woman was mitigated to Whipping, and afterwards to be ſhut up in a Monaſtery.

Our *Saxon* Anceſtors compell'd the Adultereſs to ſtrangle her ſelf, and he who debauch'd her was to be hanged over her Grave.

* 2 Rol. Abr. 355. (*a*) Ead'm. 6.

By an Ordinance of King *Canutus*, the Man was to make the injur'd Party ſuch Satisfaction as the Biſhop ſhould enjoin, and then he was to be baniſh'd: But if it was a Woman who had offended, her Noſe and Ears were to be cut off; but I never read that any Woman was thus puniſh'd.

By the Laws of *William* the Conquerour, (*b*) the Adultereſs was to be put to Death. And *Bracton*, an old Writer of the Law, tells us, That ſince the Woman was to undergo the Puniſhment abovementioned, it was but reaſonable the Man ſhould be puniſh'd, not with Death, but *In eo Membro quo deliquit*: And accordingly *John Britton*, (*c*) in the Reign of *H.* 3. puniſh'd one *Jeffery Miller* of *Norfolk* for debauching his married Daughter; but the King was angry, and baniſh'd *Britton*, and iſſued forth a *Proclamation*, that no Man ſhould preſume to do the like, unleſs it was in the Caſe of his *Wife*.

The aforeſaid *William* the Conquerour, not only altered the Puniſhment for this Offence, but took away this Juriſdiction from the Biſhop's Courts; eſpecially in Caſes where either his Servants, or thoſe who held of him *in Capite* were concerned; for he prohibited the Biſhops without his Leave, to excommunicate, to implead, *Vel ullo alio Eccleſiaſtici rigoris pœna conſtringere Barones vel Miniſtros ſuos Adulterio denotates*, and the Offenders were afterwards tried in the *Leet*, (*d*) which is a Temporal Court, and upon Conviction were fined; which was always paid into the *Exchequer*, except the Offence was committed in *Kent*, where the Archbiſhop reſided, and then he had a Share of the Fines; that is, if the Man was the Offender, then the King had his Fine; but if a Woman, then it was paid to the Archbiſhop.

But in many Places, (*e*) Lords of Mannors had a Privilege to puniſh their own Servants offending in this Nature, within particular Limits, and the Fines were paid to them; and this may be the Reaſon, why both the Temporal and Spiritual Courts took Cognizance of this Offence by Turns.

I do not find that there was any Strugling between theſe Courts ſo long as the Puniſhment was Capital; but when once it came to be Pecuniary, and expiated by a Fine, then as the Power of the Pope prevailed here, ſo the Spiritual Courts claimed this Juriſdiction, and had it; but when there was a Prince upon the Throne, that had Courage

(*b*) Seld. on Eadm. 185. lex. 37. (*c*) Seld. Janus 35. (*d*) Spelm. gloſs in verbo. (*e*) Spelm. gloſs in verbo Lairwite.

enough

enough to ſtand againſt him, then the Temporal Courts reaſſum'd this Judicature: But in this Conteſt the Clergy obtained, that neither they or their Cauſes ſhould be brought before any Secular Judicature, and being ſure to find Favour in their own Courts, a ſmall Fine did not diſcourage them from committing this Offence.

And thus it ſtood till the Reign of *H.* 7. *cap.* 4. when the Papal Authority began to be a little diminiſhed; for this, there was a Law made, that the Ordinary ſhall puniſh Prieſts and Clerks, and religious Men, for Incontinency, by *Impriſonment*, according to the Quantity and Quality of their Treſpaſs, for ſo is the Phraſe in that Law; and this we are told, by the Preamble of that Act, was for their more *ſure Reformation*.

So that tho the Puniſhment was ſometimes directed by the Temporal Laws, (*f*) yet the Spiritual Courts took Cognizance of the Tryals in theſe Caſes, to which it belongeth at this very Day; and there is a Canon (*g*) enjoining the Church-Wardens to preſent to the Biſhop, thoſe who offend their Brethren by Adultery.

I will not affirm, but 'tis very probable, that ſince the Spiritual Courts have a Juriſdiction in Caſes of Adultery, therefore the Common Law did not puniſh an Adultereſs with the Loſs of her Dower; but this is now remedied by the Statute *W.* 2. (*h*) *viz.* that if the Woman wilfully leaves her Husband, and lives with the Adulterer, ſhe ſhall be barred of her Dower, unleſs the Husband freely forgives her, and ſhe cohabits with him again.

My Lord *Coke* (*i*) mentions a very ſtrange Caſe, which he tells us was the firſt Judgment given upon this Branch of that Statute, and it was thus:

Sir *William Paynell* married the Widow of *John Camois*, and in her Right brought a Writ of Dower, to which ſhe was entituled by the Death of her former Husband.

The Defendant pleaded an Elopement, and that ſhe lived as an Adultereſs with the Demandant.

He replied, that her Husband granted her to him, by Deed executed in his Life-time, *Virtute cailus non vixit ut adultera* with the Demandant, Sir *William Paynell*; but as his Wife, and upon Demurrer to this Replication, Judgment was given againſt him.

(*f*) Jones 259. (*g*) Can. 109. (*h*) W. 2. cap. 34. 2 Inſt. 435. (*i*) 2 Inſt. 433.

As it was the firſt Judgment given upon this Statute; ſo 'tis the firſt and only Inſtance of a Wife which was granted by Deed: 'Tis true, it was adjudged to be againſt Law, otherwiſe we ſhould have met with many more Grants of the ſame Nature.

Lyndwood tells us, That a Perſon convicted of Adultery, is *ipſo facto*, deprived; but he is of Opinion, that there ought to be a Declaratory Sentence in the Eccleſiaſtical Court; (*k*) but if the Perſon, thus deprived, ſhould be pardoned, then he is reſtored without Suit, becauſe thoſe Courts cannot determine the Validity of a Pardon.

Adultery is likewiſe a ſufficient Cauſe of Divorce, but then it muſt be proved by Witneſſes, and not by Confeſſion of the Guilty Party; which ſee in Title Divorce.

Advowſon.

WHETHER this Kingdom was divided in Counties by King *Alfred*, or before, 'tis not material here to enquire; tho' Mr. *Selden* (*l*) was of Opinion, that it was long before: But be it as it will, as ſoon as the Land was thus divided, the Kings of *England* began to build Churches; and in a little time other great Perſons, in Imitation of them, did the like, upon a Parcel of their own Demeſnes, and endowed thoſe Churches with Lands belonging to their Mannors.

When a Church was thus built and conſecrated, it was no longer any Man's Property; but yet there was a Power reſerved in the Founder, to beſtow it upon a fit Perſon, which was afterwards called the Right of Advowſon; (*m*) and this was no more than in his own Name, to preſent ſuch Perſon to the Biſhop upon a Vacancy; and the Founders in a religious Zeal which was fervent in thoſe Days, always appointed Advocates to defend the Rights of their Churches in any Courts; and this afterwards became an Honorary Title.

So that by degrees, thoſe who gave the Ground on which Churches were built, and the Founders, and thoſe who endowed them when built, (*n*) were called Advocates, or Patrons; and the Right which they had to preſent, was called the Right of Advowſon; not as ſome Men would

(*k*) Hob. 213. Cro. Eliz. 41. 789. (*l*) Seld. Tit. Hon. 509. (*m*) 1. Inſt. 17. b. (*n*) 1. Inſt 119. b.

have

have it, becauſe the Patron *Advocat alium* to ſupply the Vacancy, but becauſe he was bound to protect and defend the Church from Oppreſſion and Violence.

An Advowſon, as it ſtandeth in our Law, is { Appendant or In Groſs.

Under which Diviſion I ſhall ſhew,

I. To what an Advowſon is properly Appendant, and to what not.

II. I ſhall move it to be a Temporal Inheritance.

III. By what Words it paſſes in the Caſe of the Queen, and of a common Perſon.

IV. What Acts make an Advowſon in Groſs, and what not.

V. I ſhall mention ſomething concerning the Forms of Pleading in theſe Caſes.

I. As to the Firſt of theſe, all Advowſons to which common Perſons had any Right, were originally appendant to Mannors: becauſe the Church it ſelf was built on thoſe Lands which were Parcel of the Mannor, and the Right of Patronage, or the *jus honoroficum*, as the *Civilians* call it, came from the Endowment out of ſuch Lands.

Now tho' 'tis commonly ſaid that an Advowſon is appendant to a Mannor, yet in Truth 'tis appendant only to the Demeſnes, (*o*) becauſe thoſe are of perpetual Subſiſtance, whereas Rents and Services are likewiſe Parcel of a Mannor; but an Advowſon cannot be appendant to them, becauſe they may be extinguiſhed.

Such Appendances are always by Preſcription, tho' the Advowſon it ſelf is not always Appendant; for it may be ſo at one Turn, and in Groſs (*p*) at another, as if the Mannor is in Coparcenary; the Advowſon to which 'tis appendant muſt be ſo too, and by Conſequence 'tis in Groſs; but yet in each of their Turns, 'tis appendant to that which they have.

As to the Advowſon of a *Vicaridge*, (*q*) 'tis appendant to the Rectory of common Right, and yet it may be likewiſe appendant to a Prebend, or to a Mannor; (*r*) as in Caſe the Rectory it ſelf before it was appropriated, was appendant to the Mannour; and if Iſſue ſhould be joined, whe-

(*o*) 1 Inſt. 122. (*p*) 8 Rep. Wiatt Wild's Caſe. (*q*) Moor 894.
(*r*) Hob. 303. Winch, Entr. 819.

ther 'tis ſo appendant or not, if it can be proved, that all thoſe, *&c.* who had the Mannor, had nominated the Perſon, and that the Abbot preſented the Nominee to the Biſhop; this is good Evidence, that it is appendant to the Mannor, becauſe the very Nomination is the Subſtance of the Advowſon it ſelf.

II. This being a real Right veſted in the Patron by the Common Law, is by that means, and by reaſon of the Appendancy, become a Temporal Inheritance, becauſe the Mannor to which 'tis appendant is Temporal.

'Tis properly *hereditus in corporatu*, but it doth not paſs by Livery, becauſe it doth not ly in manual Occupation; yet upon a *Grand Cape* in a Writ of Right of Advowſon, the Sheriff (*ſ*) may return *Quod cepit advocationem in manus ſuas*; for there may be a legal, tho' not an actual Poſſeſſion of an Advowſon; it may be Aſſets in the Hands of an Executor; a Widdow may be endowed of it, and a Husband may be Tenant by the Curteſie; a Fine may be levied, or a Common Recovery ſuffered of it; it may be forfeited upon an Attainder of Felony, and it may be loſt by Uſurpation and Plenarty of ſix Months, by Recuſancy, Outlary or Lapſe; all which ſhew that 'tis a Temporal Inheritance. Beſides, it may be granted by Deed, or deviſed by Will; and therefore where an Incumbent purchaſed the Advowſon in Fee, and deviſed that his Executor ſhould have the next Preſentation, and then deviſed the Inheritance to another; this was a good Deviſe of the next Avoidance, tho' it was of a thing in Action, and not properly deviſable, 2 *Cro.* 371.

III. In the next Place, I ſhall ſhew by what Words an Advowſon paſſeth. At Common Law, if the King had granted a Mannor, *cum Pertinentiis*, the Advowſon had certainly paſſed by thoſe Words; but by the Statute, *De Prærogat. Regis*, (*t*) 'tis enacted, that it ſhall not paſs without ſpecial Words; and yet in ſome Caſes the Law is otherwiſe, as where the Advowſon of a Vicaridge is appendant to a Rectory; and the Queen, upon an Attainder of Felony, grants the Glebe and Tyths of the Rectory by ſpecial Words, and then generally grants *Omnia Tenementa* (*u*) Parcel, and belonging thereunto, *Adeo plene, &c. prout*, the ſaid Felon had it. In this Caſe the Advowſon of the Vicaridge paſſes to the Grantee, by theſe Words, *Adeo*

(*ſ*) 2. Rol. Rep. 469. Rep. 63. b.

(*t*) 17 Ed. 2. cap. 15.

(*u*) Dyer 350. b. 10.

plene,

plene, &c. becauſe the Queen ſhould not be deceived in her Grant.

But if ſhe had granted the Rectory, *Cum pertinentiis ac etiam vicariam Eccleſiæ*, the Advowſon of the Vicaridge would not paſs, neither in her Caſe, nor in the Caſe of a Common Perſon; but if ſhe had granted *Eccleſiam ſuam* (*x*) it might have been otherwiſe, becauſe by ſuch Grant (it was my Lord *Coke*'s Opinion) that the Advowſon paſſes.

The Queen had the Advowſon of the Vicaridge of *B.* and ſhe granted the Vicaridge to *C.* (*y*) The Advowſon doth not paſs, for that is not the Advowſon, and every thing muſt paſs by proper Names.

So where an Advowſon (*z*) was appendant to a Mannor, and two Parts of the ſaid Mannor were ſeized by the King for Recuſancy, and then by Letters Patents, he demiſed thoſe two Parts with the Appurtenances, and all Profits, Commodities and Advantages to the ſame belonging. The Advowſon did not paſs by theſe general Words, as my Lord *Hobert* tells us; (*a*) and yet in another Place 'tis ſaid, that if the Word *Hereditament* is in the Grant, the Advowſon will paſs.

But my Lord *Dyer* (*b*) was of a contrary Opinion, that it did not paſs by that Word; and the Reaſon may be, becauſe an Hereditament properly ſignifies an Inheritance; out of which, a Rent may be reſerved which cannot be out of an Advowſon, for it doth not conſiſt in Manual Occupation, as aforeſaid; and therefore, if a Biſhop hath an Advowſon appendant to a Mannor which he enjoys in the Right of his Biſhoprick, and he demiſes it for 21 Years, this is good during the time he continues Biſhop there; but it will not bind his Succeſſor, becauſe 'tis not an *Hereditament*, out of which a Rent may be reſerved; and ſo 'tis void againſt the Succeſſor, by the (*c*) Statute.

IV. As to Advowſons in Groſs, I ſhall give ſome Inſtances what Acts makes them ſo, and what not.

And *Firſt*, if 'tis granted by it ſelf, then 'tis ſeparated from the Mannor, and becomes in Groſs.

If one (*d*) Acre of a Mannor is granted away, to which an Advowſon was appendant; and in the ſame Deed the Advowſon is likewiſe granted, 'tis no longer appendant, but

(*x*) 1 Leon 191. 1. Rol. Rep. 237. (*y*) Cro. Eliz. 163. (*z*) Hob. 126.
(*a*) Hob. 303. (*b*) Dyer 323. (*c*) 1 Eliz. cap. Cro. Eliz. 69.
(*d*) Dyer 48.

in Groſs; becauſe 'tis not beneficial for the Grantee that it ſhould be ſo.

An Uſurpation and Plenarty for ſix Months, (e) ſevers an Advowſon from the Mannour, and makes it in Groſs in the Caſe of a Common Perſon, but 'tis not ſo in the Caſe of the Queen; for tho' ſhe may be diſpoſſeſſed of her Preſentation, by this means, yet ſhe may grant the Advowſon, notwithſtanding ſuch Uſurpation.

But a wrongful Collation will not make any Diſappendancy, or binding Plenarty againſt the true Patron.

And as 'tis in Groſs, (f) ſo 'tis entire and cannot be divided into Parts, ſo as to be held in Severalty, as if a Fine ſhould be levied of a Mannor to which an Advowſon is appendant, and a Third Part both of the Mannor and Advowſon, is rendered back to *A.* for Life; another Third Part to *B.* for Life; and another to *C.* for Life, with divers Remainders over; notwithſtanding this Diviſion, they are all Tenants in Common of the Advowſon; and if they cannot agree to preſent, the Biſhop muſt do it by Lapſe.

But yet a Man may be ſeized of the Advowſon of two Parts of a Church; for there may be ſeveral Portions in one Church, to which ſeveral Patrons may have a Right to preſent, as the Place may require.

V. *Laſtly*, As to the pleading in thoſe Caſes, 'tis always ſet forth, that the Plaintiff was ſeized as of Fee; and it muſt not be in his Demeſne as of Fee, becauſe an Advowſon is not properly a Demeſne; for 'tis an incorporeal Inheritance, as hath been already obſerved

In Caſes (g) of Appendancy, if the Plantiff ſets forth that the Advowſon was *appendant*, *&c.* and that he did *preſent* to the Church as appendant there, the Defendant may either traverſe the *Appendancy*, or the *Preſentation*; for tho' the Advowſon was appendant, yet if the Plaintiff did not preſent, he had loſt his Title.

But if he had not ſet forth a Preſentation *by Vertue of the Appendancy*, but only in general, that he was ſeized of the Mannor to which the Advowſon was appendant, and that he preſented ſuch a Clerk; there the Preſentation muſt be traverſed, and not the *Appendancy*; becauſe notwithſtanding the *Appendancy*, the Preſentation might have been by Uſurpation.

(e) Gawdy verſ. Ep'm. Cantur. Hob. (f) Godb. 128. 2 And. 21.
(g) Vaugh. 150

Ali-

Alimony.

THIS Word, in a legal Senſe, ſignifies that Propotion of the Husband's Eſtate, which by the Sentence of the Eccleſiaſtical Court, is allowed to the Wife, for her Maintenance upon any Separation from him, which is not cauſed by her Elopement or Adultery.

'Tis properly cognizable by the Ordinary, (*b*) and by no other Court: 'Tis true, there lies an Appeal, but ſtill to an Eccleſiaſtical Judge; and if the Perſon convicted will not obey the Sentence, he may be Excommunicated.

By the Civil Law, notwithſtanding the Elopement of the Wife, yet her Husband muſt allow her *Alimony*, *Pendente lite.*

The Form of proceeding in ſuch Caſe is thus: The *Proctor* alledges, that the Parties were married, and prays that the Man may be condemned *in expenſis litis & alimoniæ*; this appearing to be true, the Judge condemns him accordingly.

Then the *Proctor* gives him a Bill of Coſts, and at the Bottom writes thus, (*viz.*) *Petit pars dictu B. ſumptum alimoniæ*, from the Time of the Citation, *durante lite juxta ratam* of ſo much *per* Week, leaving a Blank for the Judge to inſert it *uſque finem litis*,

Then he taxes the Coſts, and being certified of the Abilities of the Man, he taxes ſo much for Alimony, weekly, *&c. Niſi aliter per nos decretum erit*, and the uſual Sum is the Third, or at leaſt the Fourth Part of the yearly Value of the perſonal Eſtate of the Husband.

This is not very Beneficial, becauſe 'tis not a final Sentence, and by the Form of it 'tis abſolutely in the Power of the Judge to alter it; for 'tis *Niſi aliter decretum erit per nos*, whereas the Judgments in the Temporal Courts are more ſtrict, *(viz.) Niſi cauſâ oſtenſa fuerit in contrarium*, &c.

But in theſe Caſes of *Alimony*, if the Wife voluntarily depart, and afterwards repents, and ſubmits, and deſireth to co-habit with her Husband, and he refuſes, then he muſt allow her *Alimony*; but if her Departure was occaſioned by him, *Propter ſævitiam*, and he ſhall offer ſufficient Security for his good Behaviour to her, and ſhe refuſes to return, he ſhall

(*b*) 1 Rol. Rep. 110. Cro. Car. 220. Manh. 80.

not

not allow her *Alimony*. And yet if the Spiritual Court (*i*) ſhould decree it in ſuch Caſe, the Party is without remedy; for the Temporal Courts will not grant a Prohibition, becauſe the Ordinary is the proper Judge, both of the Security and Reconciliation.

Altarage.

THIS *ex vi Termini*, ſignifies the Profits which the Prieſt had by Oblations at the *Altar*; for when the Mother-Church was appropriated to a religious Houſe, (*k*) the Oblations made in the Chappel of Eaſe, did not belong to the Convent, but to the Parſon who officiated at the *Altar*, and from thence it was called *Altarage*.

'Tis a Word which was generally inſerted in the Endowment of a (*l*) Vicaridge; thus we read a Parſonage was appropriated *Salva vicaria quæ conſiſtit in altaragio & in minutis Decimis aut ins parochiæ*; and in a larger Senſe, 'tis a Word which comprehends all the ſmall Tyths which the Vicars had for their Maintenance; but then there muſt be either ſome Cuſtom or Uſage to make it ſo extenſive.

In the Caſe of *Turner* and *Edwards*, 21 *Eliz.* in the *Exchequer*, by a Compoſition for the Profits aſſigned for the Vicars Maintenance, he was to have *Altaragium cum manſo competenti*, by which Words all ſmall Tyths were comprehended.

So in the Common Pleas, (*m*) *Anno.* 4 *Car.* Dr. *Wood* againſt *Greenwood*. There was a Compoſition, that the Parſon ſhould have the Tyth of Grain and Hay, and the Vicar ſhould have *Altaragium*; and the Queſtion was, if the Vicar ſhould have the Tyth of Underwood, by Vertue of that Word; it was held, that if ever any ſuch Tyth had been paid to him, it ſhould be paid ſtill.

The ſame Caſe is reported in *Hetley*, Word for Word. 'Tis true, Wood is not due to the Vicar, but by Preſcription or Uſage; becauſe 'tis great Tyth, and therefore will not paſs by the Word *Altarage*, ſtrictly taken, becauſe 'tis only what is offered at the *Altar*; but when by Cuſtom or Uſage, Tyth-Wood hath been paid to the Vicar, it ſhall be conſtrued to paſs by that Word *Altaragium*.

(*i*) 2 Cor. 364. (*k*) Still. 175. (*l*) Cro. Eliz. 578. (*m*) Litt. Rep. 244. Hetley 135.

So

So likewiſe by Cuſtom and Uſage (*n*) it will paſs Tyth-Wool to the Vicar.

Sir *Simon Degg* tells us, that in ſome old Endowments we may find the Word *Altare omnia*, and cites the Caſe before-mentioned in *Cro. Eliz.* and *Spel. Gloſſary in verbo*, in the Margent there; what he means by it I cannot tell, for there is no ſuch Word to be found there, and I believe no where elſe.

Theſe Oblations at the *Altar* were incertain, both in reſpect to the Quality and Quantity of the Things offered, which was ſometimes in Bread and Wine, and ſometimes in Money; but how much of each I cannot diſcover, tho' it ſeems there was an accuſtomed *Altarage*.

But be it how it will, the Vicars were not contented with it, for they would not ſuffer the People to come to Confeſſion, before they had depoſited ſome Money beyond the uſual Offering; and when a Canon was made to prohibit them from extorting Money upon this Occaſion, they found out a Way to make Leaſes of their Eccleſiaſtical Profits, which was likewiſe prohibited by another Canon in Cardinal *Otho*'s Time.

Annals.

THeſe are the Profits of one Year of every vacant *Biſhoprick* in *England*, claimed at firſt by the *Pope*, upon a pretence of defending the Chriſtians from the Infidels; and it was paid by the ſucceeding *Biſhop*, before he could receive his Inveſtiture from *Rome*.

Afterwards the *Pope* prevailed on all thoſe who were Spiritual Patrons to oblige their Clerks to pay theſe *Annals*; and ſo by Degrees they became payable by the Clergy in general.

Some of our Hiſtorians tell us, that *Pope Clement* was the firſt who claimed *Annals in England* in the Reign of *Ed.* I. but (*o*) Mr. *Selden* in a ſhort account which he has given us of the Reign of *William Rufus* affirms, that they were *Antiently* claimed by the *Pope* before that Reign.

But tho' they were *claimed* by the *Pope*, they were paid to the King, as all vacant *Biſhopricks* were in that Reign; and our Chronologers differ about the time when they became a ſettled Duty, and payable to the *Pope*.

(*n*) Brett verſ. Ward Winch. (*o*) Jan. Angl. 59.

Pla-

Platina tells us, that *Bonifiace* IX. who was *Pope* in the firſt Year of *H.* 4. *Annatarum uſum Beneficiis Eccleſiaſticis primum impoſuit*, (viz.) *dimidium Annui proventus fiſco Apoſtolico perſolvere.*

Walſingham affirms it to be above 80 Years before that time, (*viz.*) in the time of *Pope John the* 22. who was *Pope* about the middle of the Reign of our *Ed.* 2. and that he *Reſervavit Cameræ ſuæ primos fructus beneficiorum.*

And certainly our own Countryman is rather to be believed in this matter than *Platina*, becauſe we find that *Ed.* 3. (*b*) forbid the *Popes* Collector to gather, and the People to pay Firſt Fruits, for that it was a *meer novelty*; and if ſo they could not be firſt appropriated *Fiſco Apoſtolico in the time of H.* 4. for it was then grown into a Cuſtom to pay them to the *Pope*, and therefore in the 4*th* and 6*th* Years of *R.* 2. upon the Petition of the Commons of *England*, *Proviſions* were made againſt collecting theſe *Annals*, and *Annuis* 6 & 9 *H.* 4. (*c*) this was called a horrible Miſchief, and damnable Cuſtom, and it was then enacted, that the *Popes* Collectors ſhould no longer levy Firſt Fruits in this Kingdom.

But notwithſtanding theſe Statutes againſt Proviſions, ſuch was the Plenitude of the *Popes* Power, and ſo great was the Profit which accrued to him by this Invention, that in a little more than half a Century there was 160000 *l.* paid to him under the name of (*d*) *Annals* for expediting *Bulls of Biſhopricks only.*

The Payment of theſe was continued till about the 25*th* Year of *H.* 8. *cap.* 20. and then an Act was made, reciting that ſince the beginning of that Parliament, another Statute was made for the ſuppreſſing the Exaction of *Annals* of Archbiſhops and Biſhops wrongfully taken by the *Pope*; and that no Biſhop hereafter ſhall pay the ſame, under the Penalty of forfeiture of his Goods and Chattels to the King, and all his Temporal Poſſeſſions belonging to his Biſhoprick, during the time he ſhould have any Title to the ſame; which Act is not printed.

But the Parliament being unwilling to go into Extremities, remitted the putting that Act in Execution to the King himſelf, that if the *Pope* would either put down *Annals*, or ſo moderate the Payment by a certain time, that they might no longer be a burthen to the People; than the King by Letters Patents might declare the Act ſhould be of no force.

(*b*) 4 Inſt. 120. (*c*) 4 Inſt. 120. (*d*) Bur. Hiſt. Ref. 1 Vol. Coll. Rec. 103.

The

The *Pope* having notice of all this Matter, and taking no Care to reform thoſe Exactions, therefore that Statute was confirmed; and becauſe it only extended to *Annals paid for Archbiſhopricks and Biſhopricks*, therefore in the very next year, another Statute was made 26 *H.* 8. *cap.* 3. that not only thoſe Firſt Fruits formerly paid by *Biſhops*, but thoſe of *every other Spiritual Living* ſhould be paid to the King; and in this Act there is a Clauſe, that if any Perſon ſhould be convicted by Preſentment, Confeſſion, or Witneſſes before the Lord Chancellor or Commiſſioners, *&c.* to have entred on a Spiritual Living before Payment or Compoſition made for the ſame, he ſhould forfeit double the value of ſuch Firſt Fruits. Notwithſtanding theſe Laws, there were ſtill ſome Apprehenſions, that upon the Death of ſeveral Prelates who were then very old, great Sums of Mony would be conveyed to *Rome* by their Succeſſors, therefore *Anno* 33 *H.* 8. *cap.* it was enacted, That all contributions of *Annals* for Biſhopricks, or for any Bulls to be obtained from the See of *Rome* ſhould ceaſe, and not be paid under the penalty of forfeiting all his Goods, and his Temporalties during the time he ſhould poſſeſs the ſame; and if the *Pope* ſhould deny any Bulls of Conſecration by reaſon of this Prohibition, then the Biſhop preſented ſhould be Conſecrated in *England* by the Archbiſhop of the Province; and if it was in the Caſe of an Archbiſhop, then he ſhould be Conſecrated by any two Biſhops to be appointed by the King; and that inſtead of *Annals*, a Biſhop ſhould pay to the *Pope* 5 *l. per Cent.* of the clear yearly value of his Biſhoprick.

But before this time, *viz.* 32 *H.* 8. *cap.* 42. there was a Court erected by the *Parliament*, for the Levying and Government of theſe firſt Fruits, which Court was diſſolved by Queen *Mary*; (*r*) and in the next Year the Payment was ordered to ceaſe as to her.

But *Anno* 1 *Eliz.* they were again reſtored to the Crown, and the Statute 32 *H.* 8. which directed the Grant and Order of them was re-continued; and that they ſhould be from thenceforth within the Government of the *Exchequer*.

But Vicaridges not exceeding 10 l. *per Annum*, and *Parſonages* not exceeding 10 Marks, according to the Valuation, in the firſt Fruits-Office, were exempted from Payment of firſt Fruits; and the Reaſon is, becauſe Vicaridges, in time of *Popery*, (when this Valuation was made) had a

(*r*) 1 Mar. cap. 10. 2. & 3 Ph. & Mar. cap. 4.

large

large Revenue, by voluntary Oblations, which ceaſed upon the Diſſolution, *&c.* and therefore they had this Favour of Exemption allowed to them afterwards.

By the before-mentioned Statute, a new Officer was created, called a Remembrancer of the firſt Fruits, whoſe Buſineſs was to take Compoſitions for the ſame; and to ſend Proceſs to the Sheriff, againſt thoſe who did not pay it; and by the Act 26 *H.* 8. he who entered into a Living, without compounding, or paying the firſt Fruits, was to forfeit double the Value.

To prevent which Forfeiture, it was uſual for the Clerk newly preſented, to give Four Bonds to pay the ſame, within Two Years next after Induction, by Four equal Payments.

But tho' theſe Bonds were executed, yet if the Clergyman died, or was legally deprived before the Payments became due, it was a good Diſcharge by Vertue of the Act 1 *Eliz.* before-mentioned.

And thus it ſtood, till Queen *Anne* taking into Conſideration the inſufficient Maintenance of the poor Clergy, ſent a Meſſage to the Houſe of Commons by one of Her principal Secretaries, ſignifying Her Intention, to grant the firſt Fruits for the better Support of the Clergy; and that they would find out ſome Means to make Her Intentions more effectual.

Thereupon an Act was paſſed, by which the Queen was to incorporate Perſons, and to ſettle upon them and their Succeſſors, the Revenue of the firſt Fruits; but that the Statutes, before-mentioned, ſhould continue in Force for ſuch Intents and Purpoſes as ſhould be directed in Her Grant: And that this new Act ſhould not extend to impeach, or make void any *former Grant* made of this Revenue.

And likewiſe any Perſon, except Infants and Feme Coverts, without their Husband might, by Bargain and Sale enrolled, diſpoſe Lands or Goods to ſuch Corporation, for the Maintenance of the Clergy, officiating in the eſtabliſhed Church, without any ſettled competent Proviſion belonging to the ſame; and the Corporation might alſo purchaſe Lands for that purpoſe, notwithſtanding the Statute of *Mortmain.*

Purſuant to this Law, the Queen, *Anno.* 3. of Her Reign, incorporated ſeveral of the Nobility, Biſhops, Judges and Gentry, *&c.* by the Name of the Governours, of the Bounty of Queen *Anne*, for the Augmentation of the Maintenance

nance of the poor Clergy, to whom She gave the firſt Fruits, *&c.* and appointed the Governours to meet at the Prince's Chamber in *Weſtminſter*; or in any other Place in *London* or *Weſtminſter*, to be appointed by any Seven of them, whereof a privy Councellour, a Biſhop, a Judge, or Councellor at Law, to be of the *Quorum*; there to conſult about the Diſtribution of this Bounty.

That Four Courts ſhall be held by theſe Governours in every Year, *viz.* in the Months of *December*, *March*, *June* and *September*; and that Seven of the ſaid Governours, whereof ſuch Three, as aforeſaid, to be of the *Quorum*, ſhall be a Court; and that the Buſineſs ſhall be diſpatched by Majority of Votes; that ſuch Courts may appoint Committees out of the Number of the Governours, for the better managing their Buſineſs; and at their firſt, or any other Meeting, propoſe in Writing, and deliver to the Queen, what Methods they ſhall think fit for the Government of the Corporation; which being approved under the Great Seal, ſhall be the Rules of the Government thereof.

That the Lord Keeper ſhall iſſue out, at Writs of Enquiry, at the Requeſt of Seven of the Governours *Quorum tres*, &c. directed to three or more Perſons, to inquire, upon Oath, into the Value of the Maintenance of poor Parſons who have not 80*l.* *per Annum*, and the Diſtance of their Churches from *London*; and which of them are in Market, or Corporate Towns, or not; and how the Churches are ſupplied; and if the Incumbents have more than one living, that Care may be taken to encreaſe their Maintenance.

That Seven of the Governours, (*Quorum tres*, &c.) after ſuch Enquiry made, do prepare and exhibit to the Queen, *&c.* a true State of the yearly Value of the Maintenance of all ſuch Miniſters, and of the preſent yearly Value of the firſt Fruits and Arrears thereof, and of ſuch *Penſions as are now payable out of the ſame*, by vertue of any former Grants.

That there ſhall be a Secretary, and a Treaſurer, who ſhall continue in their Office, during the Pleaſure of the Corporation: That they ſhall take an Oath before Seven of the Governours in Court, *Quorum tres*, &c. which Oath the ſaid Court ſhall have Power to adminiſter, for the faithful Execution of their Office; and that upon Death, or Removal, another ſhall be choſe, or any other Officer, by Majority of *Votes*.

That the Treaſurer muſt give Security to Accompt for the Money which he receives; and that his Receipt ſhall be a Diſ-

Diſcharge for what he receives; and that he ſhall be ſubject to the Examination of Four or more of the Governours, *Quorum tres*, &c.

That the Governours ſhall collect and receive the Bounties of other Perſons, and ſhall admit into their Corporation, any Contributors (whom they think fit) to ſo pious a Work; and that Seven of them, *Quorum tres*, &c. may ſubſtitute Perſons under their Common Seal, to take Subſcriptions, and collect the Money contributed; and that the Names of the Benefactors ſhall be regiſtred in a Book to be kept for that purpoſe.

This is a ſhort Hiſtory of *Annals*, or firſt Fruits, by which the Reader may ſee, that at firſt this was a *Payment* claimed only from Biſhops, upon a plauſible, but falſe Pretence, to be employed by the *Pope* in Defence of the Chriſtian Religion againſt *Pagans*.

I admit there was a Neceſſity in thoſe Days for the Biſhops to comply with this Exaction, becauſe otherwiſe they might be in Danger of looſing their Bulls of Conſecration from *Rome*, and they could have them no where elſe.

But the undignified Clergy had not ſuch an immediate Dependence upon the *Pope*, and therefore it was a mean and ungenerous Act for the Biſhops of thoſe Times, and other Spiritual Patrons, to draw in their Clergy to ſubmit to this *Payment*; becauſe it made them poor for no other purpoſe, than to heap Riches upon a foreign *Prelate*.

When the Quarrel happened between him and *H.* 8. as theſe *Annals* were gradually claimed, ſo they were by Degrees taken from him; for the King at firſt prohibited only the Biſhops to pay them, that he might ſee how it would be reſented by the *Pope*.

But he regarded it as little as his Predeceſſors did all the Statutes made againſt Proviſions, *&c.* and probably had any other Prince been upon the Throne, it would have met with the like Effect.

But that King was of a Temper, both to be feared and obeyed; and tho' the *Pope* was his Spiritual Father, yet he did not like he ſhould have ſo large a *Patrimony* here, and therefore he took a little of it himſelf, and particularly theſe *Annals*, which excepting only a little Intermiſſion, have remained in the Crown ever ſince, till the Queen commiſerating the Condition of the poorer Clergy, hath voluntarily given it for the Encreaſe of their Maintenance, that they may ſpend leſs of their time in acquiring the Neceſſaries of this Life, and

more

more in the Service of their God; that by their earneſt Application to him in Prayer, their charitable Benefactor may be crowned with Succeſs in all Her Endeavours, to promote *Piety* and *Peace* here upon Earth, and that She may enjoy a Crown of Glory hereafter.

Apparator.

THIS is a Meſſenger who cites Perſons into the Spiritual Court, and ſerves the Proceſſe thereof; the *Civilians* call him *Animal tantum rationale*, by which it may be inferred, that he is of a meaner Capacity than a Sheriff's Officer.

But becauſe he is ſuch an incomprehenſible Animal, 'tis fit the Court ſhould not be troubled with many of them, which they uſually employed till the Number was reſtrained by a Canon (*a*) (*viz.*) that a Biſhop, or Archdeacon, or Official, ſhould have no more than their Predeceſſors, for Thirty Years before the making that Canon; that ſuch an *Apparator* ſhould faithfully execute the Mandates of the Court, and make no Deputy, unleſs known and approved by the Ordinary, that he ſhould not be an Informer, nor take more Fees than preſcribed in the 135th Canon.

Biſhops deputing more *Apparators*, or they offending in the Premiſes, ſhall be admoniſhed by their Superior, and diſcharged, and if deputed by others, they ſhall be ſuſpended from their Office, till they diſmiſs them; and the Perſon thus deputed, ſhall never execute the Office of an *Apparator*; but if he doth (being once removed) he ſhall be puniſhed by Eccleſiaſtical Cenſures for Contumacy.

By a * provincial Conſtitution, it was ordered that a Biſhop ſhall have one Apparator, *Equitantem duntaxat*; and the Gloſſe obſerves, that he may have as many of thoſe Foot-Officers as he will; but an Archdeacon is to have but one; but not a Horſe-man in every Deanary.

I thought it proper to mention theſe things, tho' neither the Number, nor the Manner of riding or walking, is now much regarded, but as the Conveniency of ſerving the Proceſſe requires.

However tho' our *Apparator* is an Eccleſiaſtical Officer, yet the Temporal Courts may puniſh him for any Falſhood in the Execution of his Office, of which I ſhall give ſome Inſtances; but firſt I ſhall mention a Caſe which might have

(*a*) Can. 130. * Lyndw. cap. de cenſib.

been proper, under the precedent Title, but is not foreign to this, becauſe it ſhews the Nature of his Office, and 'tis thus:

An *Apparator* came to the Church, and told the Parſon (*b*) he muſt pay the Tenths to ſuch a Man, and at ſuch a Place, which was four Miles diſtant from his Church; and the Biſhop certified the Eccleſiaſtical Court, under his Seal, that he refuſed to pay it; and thereupon another Parſon was admitted and inſtituted; becauſe by the Statute, 26 *H.* 8. *cap.* 3. where the Tenth is due, and demanded by the Biſhop, or ſuch who ſhall be charged to collect it; or by his Miniſters, Servants or Officer; and 'tis not paid then, upon ſuch Certificate, the Incumbent is *ipſo facto* deprived: Now all this Matter was found, ſpecially upon a Verdict in Ejectment, brought by the laſt Incumbent; but it was adjudged, that this was no poſitive, or expreſs Demand to pay this Duty; beſides it ſhould be made by one who had Authority to receive it, which an *Apparator* hath not.

In the next Place, as to puniſhing him for any Falſhood in his Office, (*c*) if a Monition is awarded to him, to ſummon a Man to pay Coſts aſſeſſed by the Court; and he returns that he had ſummoned him, when, in Truth, he had not; and thereupon the Defendant is excommunicated, an Action on the the Caſe lies againſt him.

So if he falſly and malitiouſly, *Colore Officii*, (*d*) cites a Man into the Conſiſtory Court, upon a Fame of Incontinency, and the Party is diſcharged upon his Anſwer, he ſhall have the like Action; becauſe it ſhall be intended, that he did it without Proceſſe.

And this *Puniſhment* by *Action* ſeems more proper than what was inflicted on the Archbiſhop's *Apparator*, by *Bogo de Clare*, Anno. 18. *Ed.* 1. (*e*) who having ſerved a Citation upon him, in *Parliament* Time, ſome of his Family made the poor *Apparator* eat both the Citation and the Wax.

And as the Temporal Courts may puniſh an *Apparator*, ſo they may likewiſe take Notice of his Fees; for if he ſhould Libel in the Spiritual Court for his uſual Fees, a Prohibition will lie upon a Suggeſtion, that the Fees which he claimes, are not due by Cuſtom or Preſcription.

And laſtly, Becauſe many Abuſes were occaſioned by theſe Officers, therefore Biſhops, Archdeacons, and their Vicars and Officials, are prohibited by the Canon, (*f*) to have

(*b*) Moor 541. Abr. 93. (*c*) Rol. Abr. 92. 2 Cro. 351. (*d*) Cro. Car. 291. 1 Rol. (*e*) Pryn. 4. ple. Pail Writ 825. (*f*) Car. 138.

more

more *Apparators* than their Predeceſſors had for thirty Years next, before the publiſhing the ſaid Canon; and that ſuch *Apparators* ſhall execute their Mandates themſelves, and make no Subſtitute without Leave of the Ordinary; that they ſhall not be Informers, nor take more Fees than allowed by Law, *&c.*

Appeal.

THIS is the Removal of a Cauſe from an Inferior to a Superior Court, which hath Power to reverſe or affirm any former Judgment made or given in that Cauſe; and this ſeems to be a natural and fundamental Part of Juſtice: For ſince Men are ſubject to Miſtakes in ſubordinate Judicatures, there ought to be Superior Courts to rectifie thoſe Errors, and to preſerve Juſtice.

And this Superior Court was formerly that of *Rome*, to which all Appeals were made before the Reformation, tho' it was directly againſt a Decree of a whole *African* Council, in which St. *Auſtin* preſided, and therefore I ſhall give a ſhort Account of the Riſe and Progreſs, and at laſt of the Statutes, prohibiting Appeals to *Rome*.

Athanaſius (*g*) being depoſed from his *Biſhoprick* of *Alexandria*, by two Synods of *Eaſtern* Biſhops, upon Pretence of ſome Miſdemeanours, and finding no Redreſs among them, becauſe the Hereſie of *Arrius* was very powerful there, he applied himſelf to *Julius*, then Biſhop of *Rome*, that his Cauſe might be re-heard:

Julius being the Chief of the *Weſtern* Biſhops, communicated this Matter to the Reſt; and he, in their Names, ſends to the Biſhops of the *Eaſt*, that they would aſſiſt, and be preſent at this re-hearing, which theiy either refuſed, or neglected to do.

Thereupon the Biſhops of the *Weſt* re-examined the Cauſe, and received *Athanaſius* into their Communion.

But the *Eaſtern* Biſhops being offended at theſe proceedings, to reconcile the Difference, the Emperours *Conſtantius* and *Chlorus*, appointed a general Council to be held at *Sardica*, where the Biſhops, both of the *Eaſt* and *Weſt* met; and amongſt the reſt, ſome of our *Britiſh* (*h*) Biſhops were there; tho' ſome learned Men queſtion whether that was ſo or not; this happened in the 4th Century.

(*g*) Still. Orig. Brit. 136. (*h*) Bip. of St. *Aſaph*'s Church Government, 76.

This Council did not ſit long, for the Biſhops of the *Weſt* would have *Athanaſius* admitted amongſt them, becauſe they had reſtored him; but the other refuſed, and ſo withdrew, and proteſted againſt their proceedings; yet the *Weſtern* Biſhops continued ſitting, and made Canons concerning the re-hearing the Cauſes of Biſhops, (*viz.*) if the Party was grieved at the Sentence, that then a re-hearing ſhould be granted.

But this gave no peculiar Authority to the Biſhop of *Rome* to receive Appeals, he had no ſuch Power before; and that which was given to him, by a particular Council, and upon preſent and emergent Occaſions, could not be binding to Poſterity; eſpecially ſince that Power which was originally limited, was afterwards claimed by him, as an abſolute and ſupreme Right, and that as Head of the Church, and not by the Act of that Council.

Now 'tis plain, that the Canons made in that Council, gave him no Right to draw Cauſes to *Rome*, by way of Appeal, becauſe it was then decreed, that the Cauſes of Biſhops, in the very firſt Inſtance, ſhould be heard by the Biſhops of the Province.

Beſides, that Council it ſelf took upon them to judge *Athanaſius* his Cauſe, which had been judged before, by the Biſhop of *Rome*, to whom it was remitted by the aforeſaid Emperors, who might have decided the Matter themſelves; for they had a Power over all Eccleſiaſtical Cauſes in the *Empire*, and ſo had the Kings of *France*, Anno. 1268. where Appeals to *Rome* were prohibited, by the Law called the *Pragmatick Sanction*; and ſo have our Kings here; and therefore this Power of drawing Cauſes to *Rome*, by way of Appeal, was frequently oppoſed; tho' at ſome times with more Reſolution than at others; till at laſt, by ſome Princes, either feeble in themſelves, or engaged in Conteſts at Home, this Power of receiving Appeals was given up, and the firſt Attempt of any ſuch Appeal to *Rome* was by *Anſelme*, Archbiſhop of *Canterbury*, in the Reign of *William Rufus*.

It was no ſooner attempted but oppoſed; for the Biſhops and Barons told him, it was a thing not heard before, and contrary to the ancient Cuſtoms of the Realm, confirmed by the Conqueror, received from King *Edgar*; and before him from King *Alfred*, and which *Anſelme* himſelf had ſworn to maintain.

The Archbiſhop gave them an evaſive Anſwer, that he could not obſerve this Cuſtom, tho' he had ſworn to it, becauſe it was againſt the Authority of St. *Peter*; and

that it was inconſiſtent with the Supremacy of the *Pope*.

The Cauſe of his Appeal was thus: (*viz.*) *Clement* and *Urban* were Competitors for the *Popedom*; the King enclined to the Title of the one, and the Archbiſhop owned the other.

The King told him it was a thing never done by any of his Predeceſſors, without the Royal Licenſe; and that he would not be deprived of his Prerogative, and therefore commanded him not to own *Urban*.

The Archbiſhop refuſed to comply, but inſiſted to go to *Rome* for his Pall; thereupon the King told him, that if he went thither, he would ſeize on the Revenues of his Archbiſhoprick, but that did not prevail with him.

The King ſeeing him reſolved to go without his Leave, required him to take an Oath, not to appeal to the *Pope*, upon any Occaſion whatſoever; which if he refuſed, then he ordered him to depart immediately, and accordingly he departed, and the King ſeized all his Goods.

The Archbiſhop appealed to the *Pope*, that the King had ſubverted the Laws of God, and all Canonical Conſtitutions, and would not give him Leave to come to his Holineſs for Redreſs.

The *Pope* having heard this Complaint, promiſed Relief, and wrote to the King to reſtore him, under Pain of Excommunication; but the King having ſent an Envoy to *Rome*, he ſo far prevailed at that Court, that tho' the Archbiſhop's Cauſe was propounded, in a Council held there, yet nothing was done to his Advantage; the *Pope* himſelf putting a Stop to all farther Proceedings againſt the King.

Mr. *Pryn* (*i*) in his Animadverſions on my Lord *Coke*, denies this to be the firſt Appeal from hence to *Rome*; for he tells us that *Wilfrid*, Archbiſhop of *York*, being depoſed in the Reign of *Egfrid*, King of *Northumberland*, appealed to *Rome*, where the *Pope*, in a full Council, decreed him to be reſtored:

But that Decree was never received here; ſo that (*k*) *Wilfrid* returning, went as far from the *North* as he could, and came into *Suſſex*, where the King, who Ruled in thoſe Parts, gave him *Selſey*, and there he founded a Monaſtery, which his Succeſſors held for many Years; and it was afterwards made the Seat of the Biſhop of that Dioceſs, and ſo it continued till removed to *Chicheſter*.

But in the Reigns of ſucceeding Kings, as the *Pope*'s Su-

(*i*) Fol. 238. (*k*) Tyrr. 198, 199.

premacy came to be exalted, Appeals to him were a neceſſary Conſequence thereof; and for a long time the Papal Authority prevailed over the Regal; but at laſt the *Pope*'s living at *Avignon*, and being followed with Schiſms, when they returned to *Rome*, their Power began to ſink; and then Councils aſſerted the Freedom of the Church from Papal Encroachments, till at laſt Princes and Popes divided all the Rights which were claimed by the Church; and Kings reaſſumed the Power of determining Cauſes by Appeals, in their Secular Courts; but ſtill with ſo tender a Regard to that Spiritual Juriſdiction, which had been practiſed in ſuch Caſes, that a Diſtinction was found out to palliate their Authority; for the Cauſe of Appeal was ſuppoſed to be upon ſome Irregularity committed by the Eccleſiaſtical Judge in his proceeding; ſo that the Appeal was from the Abuſe, and not from the Juriſdiction.

Beſides the Secular Courts were to re-hear the Cauſe according to the Canons, and ſo by this means they poſſeſſed themſelves of it, but gave Judgment according to the Common Law.

Theſe Appeals to *Rome* were very frequent, which at firſt were rarely brought, but upon great and extraordinary Occaſions, which ſeldom happened; and it was an unuſual thing in the Reign of King *Stephen*: For when a Difference happened between *Henry* Biſhop of *Winton*, that King's Brother, and the Archbiſhop of *Canterbury*, becauſe *Winton* was made the *Pope*'s Legate, which the other thought to be an Encroachment on his Right as *Legatus natus*: The Legate appealed to *Rome*, which the Writers of that Age affirm to be the firſt Appeal thither; but that may be a Miſtake; however *Gerons* and *Huntington* tells us, that *in Anglia appellationes non erant in uſu*; and that they were *inaudita* here *donec Henricus dum legatus eſſet malo ſuo crudeliter intruſit.*

But the time was now come, when the *Pope*'s Authority was to be ſuppreſſed here; and the Biſhop of (*l*) *Sarum* tells us by what Degrees; as firſt it was diſputed, what Power he had to diſpence with the Laws of God; from that they inquired what Juriſdiction he had in the Cauſes of Men; upon which followed the Conviction of the Clergy in a Premunire; for this led the Parliament to controvert his Right to *Annates*, which they condemned, and then naturally followed the Condemning all Appeals to *Rome*.

And now I ſhall give a ſhort Account of that Statute of

(*l*) Hiſt. Reform. 1 P. 136.

24 *H.* 8. *cap.* 12. by which all Appeals to *Rome* were prohibited; a Statute which is founded upon the natural and independent Right of our Kings, to do Juſtice to all their People; a Statute by which the ancient Right of the Crown was re-aſſumed; for tho' that Right was given up by King *John*, yet it was always claimed by his Succeſſors; and ſometimes with that Courage, as to commit the Appellants.

The Preamble of the Statute takes Notice, that the Crown of *England* is Imperial, and that the Nation is a compleat Body within it ſelf, with full Power to adminiſter Juſtice in all Caſes whatſoever; and that this was a Truth which appeared by many ancient Hiſtories and Chronicles.

That former Kings of *England* and their Parliaments, had made Laws, by which they preſerved the Prerogatives of the Crown, and the Liberties of the People, from any Violation by foreign Princes or Powers; that notwithſtanding ſuch Laws, many Inconveniences had happened by reaſon of Appeals to *Rome*, both in Expences and Delays of Suits, therefore it was enacted,

That all Cauſes *Teſtamentary, and Matrimonial Divorces, Rights of Tythes, Oblations and Obventions*, ſhall be adjudged within the King's Authority, and not elſewhere; notwithſtanding Appeals to *Rome*, or any Inhibitions or Bulls from thence; that if any Spiritual Perſons refuſed to execute Sentences given in their Courts, for fear of any Cenſures from *Rome*, they ſhould be committed for a Year, and fined at the King's Pleaſure; and if any Perſon procured or executed any Proceſs from *Rome*, he ſhould be guilty of a Premunire.

But by this Statute Appeals are allowed in theſe Caſes:

(1.) From the Archdeacon or his Official to the Biſhop of the Dioceſs, or his Commiſſary.

(2.) From the Commiſſary to the Dean of the Arches, and from him to the Archbiſhop of the Province, whoſe *Determination ſhall be final*; the Appeal muſt be within Fifteen Days after Sentence.

But ſome Alteration was made in this laſt Matter, in the very next Year, (*viz.*) that Appeals from the Archbiſhop's Court ſhall be made to the King in *Chancery*, where the Lord Keeper is to iſſue out a Commiſſion under the Great Seal, to certain Perſons named by the King, from whom there ſhall

be no farther Appeal; and this is called the *Court of Delegates*.

One would think by these restrictive Words, that a Sentence given in that Court should be definitive, but yet 'tis otherwise: For the Queen, (*m*) even after such Sentence, may grant a *Commission of Review*; because the Pope could do it by vertue of the Canon-Law; and what he could do by vertue of an usurped Supremacy the Queen may do, because 'tis a legal Right vested in the Crown; this is the Reason given by my Lord *Coke*, who tells us he was Attorney-General, and did maintain this Prerogative.

'Tis certain this is a Prerogative vested in the Crown; but my Lord *Coke*'s Reason is not conclusive, that because the Pope exercised a Power by Usurpation; therefore the Queen may lawfully use the like Power.

I know *Commissions of Review* are frequently granted notwithstanding the Statute enacts, that from a Sentence of Commissioners Delegate, there shall be no Appeal; and that the Practice hath obtained against an express and positive Law; but it was not very clear at first, for it was debated in * *Holliwell*'s Case, where Justice *Fenner* denied my Lord *Coke*'s Reason; because the Authority of the Pope was abrogated, and Appeals were restrained by these Statutes; 'tis true, he cited one *Goodman*'s Case where it was so adjudged, which I find reported by another Name in my Lord *Dyer*; and because 'tis probable my Lord *Coke* grounded his Opinion upon it, I shall only State it.

The Deanry of *Wells* (*n*) was dissolved by Act of Parliament, and a new one erected; and the King appointed *Goodman* to be the first Dean, who was afterwards made a Prebendary of *Wivelscomb* being a Prebend of the same Church, for which he was deprived by the Commissary of the Bishop of *Bath* and *Wells*; because by the Canon-Law, he could not hold two such Dignities *simul & semel* in the same Church.

He appealed to the Archbishop, who confirmed the Sentence, then he appealed to the King in *Chancery*; and pending this Appeal, the King granted the Deanry to *Turner*; and upon the Death of *Ed.* 6. *Goodman* obtained a Commission from *Queen Mary* to the *Delegates* who restored him.

Now tho' the Statute saith, that a Sentence given by the *Delegates*, shall be definitive; yet *Turner* obtained a *Commission of Review* from Queen *Elizabeth*, and the Commissioners restored him, notwithstanding *Goodman* objected against it as invalid, for the Reason abovementioned; but the

(*m*) 4 Inst. 341. * Moor 463. (*n*) Dyer 273.

Ob-

Objection was over-rul'd, becauſe the Queen hath all that Authority which the *Pope* (o) had formerly as Head of the Church; and he did grant *Commiſſions of Review*, therefore She may do it:

Not becauſe he had done it by Uſurpation, but becauſe this Power was originally in the Crown, to which it reverted as ſoon as that uſurped Authority of the *Pope* was abrogated.

But to proceed; all Appeals to a Court of Delegates, (p) and grounded on the Statutes before-mentioned, muſt be upon Suits begun and determined in the Spiritual Court, or in ſome Court exempted from the Juriſdiction of the Ordinary; for if the Suit is before any Spiritual Commiſſioners; as that of *Stephen Gardner* (q) was, who was deprived of his Biſhoprick of *Winton*, by Ten Commiſſioners appointed by King *Ed. 6.* in ſuch Caſe the Appeal will not ly to the King in *Chancery*, ſo as for the Lord Keeper of Courſe to grant a Commiſſion of Delegates; but it muſt be to the King generally, as he is the Supreme Head of all Eccleſiaſtical Juriſdiction; and there muſt be a Warrant under the Sign Manual, before he can grant a Commiſſion in ſuch Caſe.

The ſaid Statutes allow an Appeal from the *Dean of the Arches* to the Archbiſhop of the Province, but do not mention in what Court; therefore it hath been a Queſtion, whether an Appeal to him *in Curia prærogativa ſua de arcubus* (r) is good or not; and it was held, the Appeal being to the Archbiſhop thoſe Words *in Curia Prærogativa* are Surpluſage.

(3.) There is another Caſe in which appeals are allowed by that Statute; and that is, if it concerns the King himſelf, then the Party may appeal from any of the Courts before-mentioned, as from the Arches or Delegates to the Upper-Houſe of Convocation.

Theſe are the three Cauſes for which Appeals are allowed by that Statute, which provides that, if an Appeal is purchaſed contrary to that Act, the Party ſo proſecuting it, ſhall be guilty of a Premunire.

The next Year after the making that Law, (ſ) all Appeals to *Rome* were expreſly forbidden, under the like Penalty; but by 13 *Eliz. cap.* 2. 'tis made High-Treaſon.

Theſe Laws were but a Recognition of the Ancient Rights of the Kings of *England*; for by the Conſtitutions of *Claren-*

(o) 26 H. 8. cap. 1. 1. Eliz. 1. (p) 2 Rol. Abr. 232. (q) 4 Inſt. 340.
(r) Dyer 240. (ſ) 25 H. 8. cap. 19.

don

don *Anno.* 10. *H.* 2. (*t*) 'tis acknowledged ſo to be, where the ſame Method of Appeals from one Court to another was appointed, and no farther without the King's expreſs Leave.

'Tis likewiſe to be obſerved, That by the firſt Statute, *viz.* 24. *H.* 8. appeals in the three *Caſes* before-mentioned, *viz. Teſtamentary*, *Matrimonial*, and *for Tythes*, ſhall be from the Archdeacon to the Biſhop, *&c.* But by the next Act in the Year following 'tis provided, *That all manner of Appeals*, of what Nature ſoever, ſhall proceed *gradatim* in the like Method.

Appropriations.

WHEN *Benedict*, who was the Father of thoſe who profeſſed a regular Life in the *Weſtern* Church, retired into a ſolitary Place in *Italy*, from thoſe Tumults which happened under the Reign of *Juſtinian*, and gave himſelf wholly to the Service of God, he ſoon acquired a great Reputation for his Holy Life; and ſeveral Perſons came and ſubmitted themſelves to thoſe Rules, which he impoſed on them for the Government of their Lives, ſo that they grew into a Fraternity; and the Princes of thoſe Times admiring their Holy Lives and Converſation, built Houſes for them which were called Monaſteries; and were ſo liberal to them, that they appropriated preſentative Benefices to thoſe Religious Houſes.

This was frequently done here after the *Norman* Invaſion; the Secular Clergy being then *Saxons* or *Engliſhmen*, but moſt of the Nobility Biſhops and Abbots, being *Normans*, they had no manner of Regard to the Secular, but reduced them as low as they could to enrich their Monaſteries; and this was the reaſon of ſo many Appropriations. But ſome are of Opinion, that 'tis a Queſtion undecided, Whether Princes or Popes firſt made Appropriations, tho' the Oldeſt of which we have any Accompt was made by Princes? As for Inſtance; By the *Saxon* Kings to the *Abby of Crowland*; by *William* called the *Conqueror*, to *Battle-Abby*; and by *H.* 1. to the Church of *Salisbury*.

'Tis true, the *Popes* who were always jealous of their uſurped Supremacy in Eccleſiaſtical Affairs, did, in their Decretals, aſſume this Power to themſelves, and granted Priviledges to ſeveral Religious Orders, to take Appropriations from Lay-men.

(*t*) Preface to 6 Rep.

But

But becauſe the making an Appropriation was a thing meerly Spiritual, the Patron uſually petitioned the Biſhop to appropriate the Church; but the King was firſt to give Licenſe to the *Monks* that *Quantum in nobis eſt*, the Biſhop might do it; and then he made the Charter of Appropriation in theſe Words (*u*) *Authoritate noſtra ordinaria Eccleſiam parochialem de* H. *priori & conventui* L. *annectimus appropriamus & unimus per præſentes, ſalvis nobis & Succeſſoribus noſtris jure & authoritate pontificali.*

But the King being ſupreme Ordinary, (*x*) might of his own Authority make an Appropriation without the Conſent of the Biſhop, tho' this was ſeldom done.

Appropriations at firſt were made only to Spiritual Perſons, ſuch as were qualified to perform Divine Service; then by degrees they were extended to Spiritual Corporations, as Deans and Chapters, and laſtly to Prioreſſes, upon a Pretence to ſupport Hoſpitality; and leaſt preaching ſhould by this means be neglected, an Invention was found out to ſupply that Defect by a *Vicar*; and it was left to the Biſhop to be a Moderator between the *Monks* and the *Vicar*, for this Maintenance out of the appropriated Tythes; for the Biſhop could compel the Monaſtery to which the Church was appropriated, to ſet out a convenient Portion of Tythes, and ſuch as he ſhould approve for the Maintenance of the *Vicar*, before he confirmed the Appropriation.

'Tis true the Biſhops in thoſe Days favoured the *Monks* too much, and therefore they connived at their ſetting out a Portion of ſmall Tythes for the *Vicar*, and permitted them to reſerve the great Tythes to themſelves.

This was a Fault intended to be remedied by the Statute 15 *R.* 2. *cap.* 6. by which it was enacted; that in every Licenſe made of an Appropriation this Clauſe ſhould be contained, (*viz.*) that the Dioceſan ſhall ordain, that the *Vicar* ſhall be well and ſufficiently endowed.

But this Statute was eluded; for the Abbots appointed one of their own *Monks* to officiate, and therefore the Parliament, *Anno.* 4. *H.* 4, *cap.* 12. provided that the *Vicar* ſhould be a Secular Man canonically inſtituted and inducted into the Church, and ſufficiently endowed; and that no Regular ſhould be made *Vicar* of a Church appropriate.

But long before the making theſe Statutes, I find the Kings of *England* (*y*) made Appropriations of the Churches of *Fe-*

(*u*) 5 Rep. Cawdries Caſe. (*x*) Plowd. 496. (*y*) Horn. Chron. de rebus geſtis Abbat Sancti Auguſtini.

verſham

verſham and *Middleton* in *Kent*, and other Churches to the *Abby* of St. *Auſtin* in *Canterbury*, by theſe Words: *Conceſſimus*, &c. *pro nobis*, &c. *Abbati & conventui*, &c. *quod ipſi eccleſias prædict appropriare ac eas ſic appropriatas in proprios uſus, tenere poſſint ſibi & Succeſſoribus in perpetuum.*

The like was done by ſeveral of the *Norman* Nobility, who came over with the King; and upon whom he beſtowed large Mannors and Lands; and out of which they found Tythes were then paid, and ſo had continued to be paid even from the time they were poſſeſſed by the *Saxons*; but they did not regard their Law of Tything, and therefore they held it reaſonable to appropriate all, or at leaſt ſome part of thoſe Tythes, to thoſe Monaſteries which they had founded, or to others as they thought fit; and in ſuch Caſes they reſerved a Power to provide for him, who ſerved the Cure; and this was uſually paid to Stipendiary Curates.

But ſometimes the *Vicaridges* were endowed, and the very Endowment was expreſſed in the Grant of the Appropriation (*viz.*) that the Church ſhould be appropriated, upon Condition that a *Vicaridge* ſhould be endowed; and this was left to the Care of the Biſhop.

But whenever the *Vicar* had competent Subſiſtence by Endowment, the *Monks* took all Opportunities to leſſen it; and this occaſioned ſeveral Decretals, prohibiting ſuch Uſage without the Biſhop's Conſent, and that no Cuſtom ſhould be pleaded for it, where he that ſerved the Cure had not a competent Subſiſtence.

And it hath been a Queſtion, whether an Appropriation is good where there is no Endowment of a *Vicaridge*, becauſe the Statute of *H.* 4. poſitively provides that *Vicaridges* ſhall be endowed.

But it is now ſettled, that if 'tis a *Vicaridge* (*z*) in Reputation, and *Vicars* have been inſtituted and inducted to the Church, it ſhall be preſumed, that the *Vicaridge* was originally endowed.

Thus much for the Tythes; but the Abbot and Convent had not only the Tythes of the appropriated Churches, but the Right of Patronage too; for that was extinct, as to the former Patron by the Appropriation, unleſs he had reſerved the Preſentation to himſelf, and that made the Advowſon diſ-appropriate, and the Church preſentable (*a*) as before, but not by the old Patron, but by the Abbot and Convent,

(*z*) 2 Cro. 252. 517. Hardr. 328. (*a*) Still. 201.

who

who were then bound upon a Vacancy, to preſent a Perſon to the Biſhop.

Sometimes the Biſhop would refuſe the Perſon preſented, unleſs they conſented to ſuch an Allowance for his Maintenance as he thought fit, and therefore they would preſent none.

This occaſioned the making another Decretal, which gave the Biſhop Power to preſent; but this did not often happen, becauſe, as I obſerved, the *Monks* were favour'd by the Biſhops; I mean the poorer Sort, for the Rich would not accept his Kindneſs. They always got their Appropriations confirmed by the Pope and their Churches exempted from the Juriſdiction of the Biſhop.

But now all thoſe Exemptions are taken away by the Statute 31 *H.* 8. *cap.* 13. and the Ordinary is reſtored to his antient Right.

Before I ſhall give an Accompt of that Statute, I think it not improper to mention the Forms of Appropriations both before and ſince that time.

A Licenſe being obtained from the King as ſupreme Ordinary, and the Conſent of the Dioceſan, Patron and Incumbent, thereupon the Biſhop made the Grant in theſe Words:

Authoritate noſtra ordinaria Eccleſiam parochialem de H. *priori & conventui* L. *annectimus appropriamus & unimus per præſentes*, &c. as before is ſet forth in this Title.

But after the Statute the Form was in theſe Words: (*a*) *Sciatis quod nos dedimus*, &c. *Decano & capitulo eccleſiæ Cathedralis* C. &c. *advocationem*, &c. *Rectoria & eccleſia parochialis de* H. *in Com.* S. *habend. & tenend.* &c. *iiſdem Decano & capitulo & Succeſſoribus ſuis in perpetuum & ulterius ſciatis per præſentes quod nos de gratia noſtra ſpeciali ac authoritate noſtra Regia, ſuprema & eccleſiaſtica qua nunc fungimur pro nobis, hæredibus & ſucceſſoribus noſtris, concedimus & Licentiam damus prædict Decano, & Capitulo & Succeſſoribus ſuis, Rectoriam & Eccleſiam prædict quando per mortem reſignationem vel deprivationem, aut per aliquem alium modum quemcunq; vacare contigerit, immediate in ſuos proprios uſus tenere ſibi & Succeſſoribus ſuis in perpetuum poſſint & valeant abſq; Moleſtatione & Impedimento noſtro, hæredum aut Succeſſorum noſtrum, ac hoc abſque aliqua Præſentatione inductione ſive admiſſione alicujus incumbentis ad eandem Rectoriam extunc in poſterum fiend ac ulterius.*

(*a*) Weſt. Tymbol Plito 339.

By the aforeſaid Statute, thoſe Appropriations, which were made formerly by Biſhops, and enjoyed only by Religious Houſes, are now become the Inheritance of Laymen; and tho' the Biſhop's Power in ſuch Caſes is not mentioned in the Statute, yet the Law leaves all Matters of Right juſt as they were before; for when thoſe Religious Houſes were ſurrendred the King was to have the Tythes in the ſame manner as the Abbots had them in Right of their Monaſteries; and there is a ſaving of the Rights and Intereſts of all Perſons; ſo that if before the Diſſolution the *Vicar* had an antecedent Right to a competent Maintenance, and the Biſhop had Power to allow it, 'tis not taken away now; and this was reſolved in (*b*) *Hitchcott* and *Thornbury*'s Caſe, where the Parſonage was appropriate to the Maſter and Choriſters of the Cathedral of *Salisbury*, and *Thornbury* was Parſon thereof and *Hitchcott*. Vicar, who libelled in the Spiritual Court for a better Maitenance, and upon a Motion for a Prohibition it was denied, becauſe the *Vicar* had Reaſon to Complain, and the Ordinary might compel the Appropriator to make an additional Allowance, for ſuch was reſerved to him in all Appropriations.

This is the Law of *England*, and 'tis founded on good Reaſon, for Tythes were originally given for the Service of the Church, and not for the private Uſe of Monaſteries; and it may be a Queſtion, whether a Monaſtery was capable of taking an Appropriation, becauſe 'tis not an Eccleſiaſtical Body; for by the Canons they could not preach, baptize, or viſit the Sick, and they had no cure of Souls.

The Biſhop of *Worceſter* (*c*) tells us, this Matter was diſputed between *St.* Bernard *a Ciſtertian Monk, and Petrus Cluniacenſis*; the firſt was diſſatisfied that Monks ſhould take Tythes from the Secular Clergy, which was given to ſupport them in attending the cure of Souls; the other anſwered him, that Monks prayed for Souls, but Tythes were not only given for Prayers but for Preaching, and to ſupport Hoſpitality.

And now I have mentioned a *Ciſtertian Monk*, I ſhall add ſomething of that Order relating to this Matter.

When thoſe Monks firſt came into *England*, they were very ſcrupulous of Appropriations, and pretended to live only on the Rents of ſuch Lands as were given to them, and by this means they ingratiated themſelves to the People, and got more Lands added to their Poſſeſſions.

(*b*) 2 Rol. Abr. 337. (*c*) Still. Eccleſ. Caſes 205.

But

But when once they became rich by ſuch Gifts, they procured large Privileges from the *Pope*, and in particular to have their Lands exempted from Payment of Tythes, which continue ſo to this very Day.

I ſhall mention one Law Caſe pertinent to this purpoſe, and ſo conclude this Title.

The Rectory of *Harfeild*, (*d*) and a Farm called *Downhall*, were appropriated to the Priory of the ſame Place; the Farm paid Tythes before the Appropriation, but afterwards it did not, becauſe what a Man hath cannot be paid to himſelf.

The Priory was diſſolved by the Statute 27 *H.* 8. and the King granted the Rectory to *Trinity-College* in *Cambridge*, and the Farm to *B.*

The *College* ſued *B.* for the Tythes of the Farm being in the ſame Pariſh with the Rectory, and the Queſtion was, whether it was diſcharged of Tythes by Unity of Poſſeſſion, that is, ſince the Prior had both the Rectory and Farm; and ſince he could not pay Tythes to himſelf, whether now it ſhould be diſcharged by reaſon of the Unity, (*e*) and held not, becauſe 'tis not properly a Diſcharge, but a Suſpenſion of the Payment for a time.

'Tis true the Prior was ſeized of an equal Eſtate in the Farm and Rectory, but ſtill it was in different Capacities, for the one was united to him in his temporal and the other in his ſpiritual Capacity;

But when the Lands came into the Hands of one Perſon, and the Rectory into the Poſſeſſion of another, then Tythes became again payable out of the Land.

Archbiſhops.

IT may not be improper under this Title, to examine the Monkiſh Story of *Lucius*, (*f*) who is ſaid to be our firſt Chriſtian King, and who lived here whilſt *Commodus*, but others ſay, whilſt *Antoninus Pius* was Emperour, but I ſhall not controvert, whether Chriſtianity was planted here before that Time, tho' moſt of our Hiſtorians agree it was.

Bede (*g*) who is one of the moſt ancient Writers of the *Engliſh* Nation, and who lived Five hundred Years after this *Lucius* (if ever there was ſuch a Perſon) is the firſt who

(*d*) Hob. 307. 2 Cro. 607. (*e*) Moor 532. (*f*) Uſher de Antiq. Britan cap. 3. (*g*) Lib. 1.

men-

mentions him, and if he took the Story out of the *Geſta Pontificum*, 'tis probable it may be falſe, and the rather, becauſe *Gildas* who lived before him takes no notice of any ſuch King.

The common Tradition is, that this King *Lucius* ſent two Perſons to *Elutherius* then Biſhop of *Rome*, to beſeech him, that by his Means he might be made a Chriſtian.

The *Pope* could not, at that time, deny ſo reaſonable a Requeſt, and therefore he baptized them both, and then made one a Biſhop and the other a Presbyter, and ſent them back into *England* to preach to King *Lucius* and his People, and to baptize them.

But this matter was not intruſted to the Care of thoſe two Perſons alone, but the *Pope* ſent two more to aſſiſt in this great Work, whoſe Names were *Faganus* and *Damianus*.

After the People were by their preaching converted from Paganiſm and baptized, theſe Holy Men conſulted with the King to erect Epiſcopal Sees in the moſt convenient Places of this Kingdom; the Reſult of which was, that the King finding three Cities of great Eminency, where the Heathens had built and endowed ſo many Temples, and where their Chief Prieſts, called *Archflamins*, offered Sacrifices to Idols, did there erect three Archbiſhoppricks, *London*, *York* and *Landaffe*, called then *Caerleon upon Oske*:

That the Dignity of the Archbiſhop of *London* continued in that See for 180 Years or thereabouts; and the Cathedral was that which is now (*h*) St. *Peter*'s Church in *Cornhill*, till King *Ethelbert* built St. *Paul*'s; and ſo it remained till the Time of the *Saxons*, when *Auguſtine* tranſlated the Pall to *Canterbury*, which has continued the Seat of an Archbiſhop ever ſince: But before the coming of St. *Auſtin* theſe *Britiſh* Biſhops acknowledged no Superiour in Spirituals, but the Archbiſhop of *Landaffe*, under whoſe Government they were, till that Archbiſhoprick was tranſlated to St. *David*'s, and afterwards, in the Reign of *H.* 1. made Subject to the See of *Canterbury*, as likewiſe were the other Biſhopricks in *Wales* at the ſame time.

But *York* remains a Metropolitical See to this very Day, and the aforeſaid (*i*) *Faganus* is mentioned by our Hiſtorians to be the firſt Biſhop thereof.

The King likewiſe finding Twenty Eight other Cities of great Note, where other *Pagan* Prieſts called *Flamins* were ſeated, and where Temples were dedicated to their Idols,

(*h*) Selden Polyolbion 128. (*i*) Heyl of Epiſc. 361.

converted them all into Chriſtian Churches, and placed ſo many Biſhops there; and this is the firſt Account of any Archbiſhops here, tho' ſome learned Men are of Opinion, that an Archbiſhop is a Dignity as ancient as the Apoſtles Time, for there were *Primi Epiſcopi* then, tho' the Name of Archbiſhop was not known till ſome Ages afterwards.

That the Apoſtle himſelf gave the firſt Model of this Government in the Church, by veſting *Titus* with a Superintendency over all *Creet*, that theſe Governours were afterwards called Princes and Monarchs of the Prieſts; but becauſe theſe were Titles applicable to temporal Powers, it look'd as if they affected ſecular Grandeur, and therefore theſe Applications were prohibited by ſubſequent Councils, and ſoon after they were called Archbiſhops.

The learned (*k*) *Gloſſographer* tells us, it was a Title firſt known in the *Eaſt* part of the World, and that one *Symion*, who lived in the Reign of *Conſtantine*, was called by *Sozomen* the Hiſtorian Archbiſhop of *Seleucia*, becauſe he preſided over the chief Cities of *Perſia*.

That Pope *Zepherinus* was the firſt who was called Archbiſhop, that there were afterwards *Metropolitans* in the great Nicene Council, but that the Archbiſhop preſided over them as well as over the Biſhops themſelves; and as to this matter 'tis certain, that, when Hereſies and Schiſms broke in upon the Church, which were chiefly occaſioned by Churchmen themſelves, it ſeemed neceſſary to fix a Metropolitan in every Province, and 'tis as certain that this was done in the 3d Century; for the Apoſtolical Canons, which were the Rule of the *Greeks* Church, in that Age, mention a *Chief Biſhop* in every Province.

But to return; thoſe who oppoſe this Story of *Lucius* ſay, That he could not be a King over all *Britain*, becauſe it was then a *Roman* Colony; and 'tis improbable that the Heathens ſhould entruſt him with ſo great a Power to rule here, or ſuffer one who was but a Tributary Prince himſelf, to make ſo many Chriſtian Archbiſhops and Biſhops at once, in order to propagate a Religion which they themſelves did not tolerate.

This ſeems to be a plauſible Argument, but Dr. *Heylin* (*l*) anſwers it by telling us, that *Lucius verus*, who was then an *Aſſociate* in the Empire, after he had put an end to the *Parthian* War, gave the Government of thoſe Kingdoms, which

(*k*) Spelm. in verbo. (*l*) Heyl of Epis 264.

he had ſubdued, to tributary Kings, and the Government of Provinces to Lieutenants.

So that *Lucius* might be a King notwithſtanding the Nation was tributary to the *Romans*, and Archbiſhop *Uſher* (*m*) proves there was ſuch a King, by the Coins which he had ſeen both of Gold and Silver, having an Image of a King, and a Croſs on them, and the Capital Letters *LVC*.

But if he was a King he ruled only in *Suſſex* and *Surrey*, becauſe that Part of the *Britiſh* Nation was not inhabited by the *Romans*, for none of their Highways, Buildings, Urns, Coins, or Inſcriptions, were at any time found in thoſe Parts, except towards the Sea-ſide, and there they had ſome Forts and Gariſons, and particularly at *Aldrington* near *Shoreham* in *Suſſex*, which was then called *Portus Adurni*.

So that being ſecure of the Coaſts, (*n*) and having Soldiers diſperſed in the Colonies about them, and being near *London*, they might permit a *Britiſh* King to govern thoſe Parts, tho' they would never ſuffer a Native over the whole Nation.

But *Heylin* has given no Anſwer to the other part of the Story of making ſo many Archbiſhops and Biſhops here, he rather thinks it too great a Task for a Tributary Prince to ſpread Chriſtianity ſo far at once over this Iſland, and therefore was of Opinion, that the *Monkiſh* Writers attribute this to him, as being the firſt Promoter of ſo great a Work, as *Rome* is ſaid to be built by *Romulus* who never built half of it:

Upon the whole matter, there is not much Credit to be given to this Story of the *Archflamins* and *Flamins*, becauſe we do not find the firſt of theſe Words in any *Roman* Hiſtory, it ſeems rather to be an Invention of *Jefferey* of *Monmouth*, who would have in every City ſeveral Colleges of *Flamins*, according to the Number of their ſeveral Gods.

The Number of the *Archbiſhops* and *Biſhops* here ſeems more properly to relate to the civil Form of Government, which was eſtabliſhed in the *Roman* Empire, which Empire was divided into Fourteen great Portions called Dioceſſes, and thoſe were ſubdivided into Provinces, in which there were ſeveral Cities.

Now wherever the Heathens had a *Defenſor Civitatis*, the Chriſtians, when they got that City, did ordain a Biſhop; and in every Province where the *Romans* had a Preſident, there the Chriſtians did place an Archbiſhop, whoſe Seat being commonly in the chief City of the Province, he was from

(*m*) Uſher de primordiis 39, 40. (*n*) Still. Origin. Britan. 61, 62.

thence

thence called a *Metropolitan*; and in every Dioceſs where the *Romans* had a *Lieutenant*, there the Chriſtians had a *Primate*, and ſeated him in the ſame City with the *Metropolitan*.

So that *Britain* was then a Dioceſs divided into three Provinces, in which there were twenty eight Cities, and of thoſe Cities the three above-mentioned were the chief, and from thence we had *Archbiſhops* and *Biſhops* here.

We have now in *England* two Archbiſhops and no more.

CANTERBURY.
YORK.

And Firſt I ſhall give an Account,

(1.) When the Archbiſhoprick of *Canterbury* was founded.
(2.) I ſhall treat of the Stile of the Archbiſhop.
(3.) Of his Precedency before *York*.
(4.) Of his Privileges.
(5.) Of his Juriſdiction.

When the Archbiſhoprick of Canterbury was founded.] As to the Firſt of theſe Things I find, that from the Time of the aforeſaid *Lucius* to the Perſecution of *Dioclesian*, Chriſtianity had been preſerved in this Nation, but then it was almoſt extirpated and continued under Paganiſm above twenty Years, till it recovered a little Life under *Conſtantine* the Great, but then it was infected with the Hereſies of *Pelagius* (o) a *Britiſh* Monk, whoſe *Welſh* Name was *Morgan*:

That Hereſie being condemned by the 5th General *Council* of *Carthage* and *Mela*, and baffled by the Arguments of *St.* German *Biſhop of Auxerre*, and of *Lupus Biſhop of* Troyes *in France* (who were ſent from thence by a *Synod*) at a publick Diſputation held at St. *Albans*, the Chriſtian Religion became again in ſome Repute, till ſuppreſſed by *Vortiger* and the Heathen *Saxons* for above one hundred Years, and until Pope *Gregory* ſent St. *Auguſtine* a Monk to convert this Nation.

The Monk was received very kindly by *Ethelbert* then King of *Kent*, who gave him a Place in *Canterbury* to erect a Biſhop's See, and there he fixed his Seat, but was not, as ſome Writers would have it, the firſt Archbiſhop thereof, for the Prieſts would not acknowledge him as ſuch; neither did

(o) Will. Gr. Brit. 181, 196.

that Pope give him that Title, tho' he gave him the *Pall* and Supremacy over *York*, and over all the *Britiſh* Biſhops.

Neither doth *Marculfus* who lived in that Age mention any ſuch Title.

'Tis true, he was the firſt Biſhop of that Place, but *Theodore*, who was the Sixth in Succeſſion to him, was the firſt Archbiſhop, and his Succeſſors have been ſo ever ſince.

Stile of the Archbiſhop.] (2.) Next I ſhall mention his ſtile.

He had anciently Primacy over *England* and *Ireland*, and all the Biſhops of the laſt Place were conſecrated by him.

By the two firſt *Norman* Kings he was declared to be Metropolitan, and was afterwards ſtiled by *Urban* the 2d. *Alterius orbis Papa.*

He is called by *Eadmerus*, *Princeps Epiſcoporum Angliæ pontifex ſummus Patriarcha*, and the Records of Eccleſiaſtical Matters were dated *Anno pontificatus noſtri primo.*

He had, tho' not at firſt, a perpetual *Legantine* Power annexed to his Archbiſhoprick, and was therefore called *Legatus natus.*

He had ſome Marks of Royalty as to be Patron of the Biſhop of *Rocheſter*, to coin Money, *&c.*

Since the Reformation he is ſtiled Primate and Metropolitan of *all England*, and Archbiſhop *Cranmer* was the firſt who had this Title.

Of his Precedency.] (3.) Next as to Precedency, I find there have been ancient Conteſts between theſe two Archbiſhops, about the Oath of Canonical Obedience and Precedency.

Thus in the Reign of *William* the Conquerour, *Thomas*, then Lord Archbiſhop of *York*, came to be conſecrated by *Lanfrank* Archbiſhop of *Canterbury*, who demanded of him a Declaration of his Canonical Obedience in writing, and that he would confirm it by Oath.

But *York* refuſed it without ſome poſitive Proof that it was his Duty ſo to do; thereupon the Matter was referred to the King, who ordered *York* to ſubſcribe the Declaration, which he did, but with a Proteſtation that it ſhould not be prejudicial to his Succeſſors without better Proof.

This was again demanded by *Archbiſhop Anſelme* in the Reign of *H.* 1. (*p*) and the King, after the Death of that Archbiſhop, commanded the Elect of *York* to acknowledge *Canterbury* as Superior before he ſhould be conſecrated.

(*p*) Eadmerus, 104.

About

About Seven Years afterwards, and in the Reign of the ſame King, the Controverſie was renewed by *Thurſtan* of *York*; and the King declared, that if he would not acknowledge the Superiority to *Canterbury*, he ſhould not be conſecrated, which *York* refuſed, and went to *Rome*, where he was conſecrated by the Pope himſelf; and thus, notwithſtanding all theſe ſolemn Determinations the See of *York* became independent, and this made *William Corbell*, who was Archbiſhop of *Canterbury*, take a Journey to *Rome*, to get the Character of *Legate*, which he obtained, and was the firſt Archbiſhop upon whom that Honour was conferred; and by this Means he ſecured the Superiority, and did afterwards *Jure Legationis* viſit the Province of *York*, and ſummoned that Archbiſhop and his Clergy to Councils, and would not ſuffer him to carry up his Croſs in his Province, when he either attended thoſe Councils or the Parliament, and therefore the King, to preſerve the Peace, did uſually ſend Writs to the Archbiſhop of *Canterbury*, prohibiting him to diſturb the other upon this Occaſion. Pryn. 409. Hoveden 758.

The like Contention there was always between theſe two Archbiſhops concerning Precedency, about which we meet with a very extraordinary Story, which was thus: In the Reign of *H.* 2. one *Hugeſon*, the Pope's *Legate*, called a *Synod* at *Weſtminſter*, where all the Biſhops of *England* met.

The Archbiſhop of *Canterbury* coming firſt, ſate down at the right Hand of the Legate, and *York* coming afterwards, refuſed to take the Seat vacant for him on the left Hand, and demanding the Place where (*q*) *Canterbury* ſate, did, upon his Refuſal, ſit down in his Lap.

This occaſioned the Synod to break up in Diſorder, and both Parties appealed to the Pope, and about four Years after this Quarrel the Matter was ſettled, that neither ſhould require Canonical Obedience of each other, but that *York* ſhould be ſubject to *Canterbury*, and ſo it continues to this very Day.

His Privileges.] (4.) In the next Place I ſhall mention ſome of the Privileges of this Archbiſhop.

He hath a Privilege to qualifie Eight Chaplains, when the greateſt temporal Peer can qualifie but Six.

He hath a Privilege to crown all the Kings of *England*; and before the Court of Wards was taken away, he had the Wardſhip of thoſe that held Lands of him.

(*q*) 2 Tyor 407.

He hath the Privilege to have Prelates to be his Officers; as for Inſtance:

The Biſhop of *London* is his Provincial Dean.
The Bp. of *Wincheſter* is his Chancellor.
The Bp. of *Lincoln* is his Vice-Chancellor.
The Bp. of *Salisbury* is his Præcentor.
The Bp. of *Worceſter* is his Chaplain.
The Bp. of *Rocheſter* carried the Croſier before him in the Days of Popery.

His Juriſdiction.] (5.) *Laſtly* as to his Juriſdiction, 'tis to be obſerved, that, next under the Queen, he hath the Supreme Government in all Eccleſiaſtical Matters within his Province; but before the Reformation he had a larger Extent of Power, and this appears by a Paragraph in the *Cottonian* Copy of the *Saxon Annals*, (*viz.*) that at a Council ſummoned by *Withred* King of *Kent*, he declared that the Archbiſhop ſhould, upon the Death of a Biſhop or Abbot, *&c.* chooſe another; and that none ſhould be elected, or conſecrated without his Conſent; and even at this time he hath a Right of conſecrating all his Suffragans Biſhops, which Right he hath by Cuſtom immemorial. In the aforeſaid Council it was declared, that as it was the King's Duty to govern the State, ſo it was the Duty of the other to govern the Church.

And as to this Matter he hath two concurrent Juriſdictions, one as Ordinary of the Biſhop himſelf within his Dioceſs; the other as Superintendant throughout his whole Province of all Eccleſiaſtical Matters, both to correct and to ſupply the Defects of the Ordinary; and therefore if he grant Inſtitution to a *Peculiar* 'tis not void, becauſe he hath Juriſdiction all over his Province; 'tis true, 'tis voidable, like a Sheriff executing Proceſs (*r*) in a Franchiſe which is not void but voidable.

Before the Reformation he had a concurrent Juriſdiction with the Biſhop of every Dioceſs in his Province, but that was not by his Prerogative as Archbiſhop, but as he was *Legatus natus*, but now no Man is to be cited out of the Dioceſs (*ſ*) where he lives.

Upon the Death of any ſuch Biſhop, the Cuſtody of his See, and his Juriſdiction, devolves upon the Archbiſhop by the Cuſtom of *England*, but then he muſt hold his Courts within that Dioceſs, where the inferiour Ordinary had Juriſdiction; except in the Dioceſs of *London*, (*t*) where by

(*r*) Lev. 212. (*ſ*) 23 H. 8. cap. 9. (*t*) Cro. Car. 340.

Com-

Compoſition between the Archbiſhop and that Biſhop, Suits ariſing within his Dioceſs, are to be determined in the Arches, and that is the Reaſon that he never viſits *London*.

He may grant a Diſpenſation to hold in *Commendam*, and generally in any Caſe where Diſpenſations were grantable before the Statute, and therefore he may diſpenſe with a Clergyman to hold two Livings; but ſuch Diſpenſations muſt be licenſed by the Queen in Chancery, if the firſt Living is above 8 *l.* and this as well within the Province of *York* as of *Canterbury*.

Panormitun calls him *Ordinarius totius Provinciæ*, for he hath a Juriſdiction *Nolente Ordinario*, as in Caſes of Viſitation; and this is a Right which is veſted in him by Cuſtom; and when he viſits he hath Power of Cenſuring any (*u*) Biſhop in his Province; he hath likewiſe a Juriſdiction in Cauſes between Parties, as in Caſes of Appeal, where there is a ſuppoſed Default of Juſtice in the Ordinary, and this is likewiſe a Right which he hath by Cuſtom time out of mind.

When he viſits an inferiour Dioceſs (*x*) if he ſhould inhibit the Biſhop during ſuch Viſitation, and he ſhould happen at that time to have a Title to preſent by Lapſe, he cannot do it; but he muſt preſent the Clerk to the Archbiſhop, becauſe during the Inhibition the Biſhop's Power is ſuſpended.

He hath exempted Churches in ſeveral Dioceſſes not viſitable by the Ordinary, but by himſelf alone. He hath an antient Right to preſide in all provincial Councils of his Suffragans, which formerly were held once in a Year, but have been diſcontinued a long time, ſo that his Power of examining things thro' his Province is now devolved to his Courts.

Then as to the Eſtates of dead Men, if there is no Will, and the Inteſtate hath Goods in ſeveral Dioceſſes, the Adminiſtration belongs to the (*y*) Archbiſhop; but if there is a Will, and the Teſtator had Goods of the Value of 5 *l.* in the Dioceſs where he died, or 10 *l.* within the Dioceſs of *London*; or if he was a Biſhop, the Probate of ſuch Will muſt be in the Prerogative Court

Of the Archbiſhop of YORK.

Some Antiquaries will have it, that the Archbiſhop of *York* was originally Primate of the *Britiſh* Church; for tho' *London* was a Place of great Trade, yet it was never a *Roman*

(*u*) Hob. 185. (*x*) 2 Rol. Abr. 357. (*y*) Sid. 99.

Colony, or a Seat of the *Roman* Emperors as *York* was, where both *Severus* and *Conſtantius Chlorus* lived and died, and where *Conſtantine* the Great was born; and from hence they infer, that where the Emperors reſided that was the moſt likely Place to have Preeminence above the reſt.

I cannot think this to be a tolerable Reaſon for the Primacy of *York*, but muſt admit that it was a Seat of thoſe Emperors only for their Conveniency in attending the Wars againſt the *Northern Britans*; it was a very agreeable Place for them to give Directions, and to ſend Supplies to their Armies, and this was the chief Occaſion of their living there.

But the Preeminence of Places amongſt the *Romans*, (z) tho' they were a very Warlike People, did not depend upon the *Military* but upon the *Civil Officers*; and that where the Court of Judicature was, there was alſo the *Metropolis*, and that was at *London*, becauſe of its convenient Situation for Trade; it was therefore called *Auguſta*, which Word implies that it was the Imperial City of *Britain*, for none had that Denomination but thoſe which were *Capita Gentium*.

But not to enter any farther into Enquires after ſuch remote things, the *Archbiſhop* of *York* is now ſtiled *Primate* and *Metropolitan* of *England*, tho' not of *all England*, and was formerly *Legatus natus* to the *Pope*.

He takes Place of all Peers except *Canterbury* and the Lord Chancellor.

He grants Diſpenſations of Non-reſidence for ſome time; and that Perſons may be made Deacons, tho' under the Age required by the Canon, and likewiſe for marrying in times and places not allowed by that Law; and this all other Biſhops may do, becauſe it was done before the Statute 25 *H.* 8. cap. 21. which gives them Liberty to diſpenſe in ſuch Caſes as formerly they uſed.

Archdeacon.

THIS is a Name of Dignity, and not only ſo, but 'tis *Dignitas principalis poſt Epiſcopum in Eccleſia*, and uſually hath ſome Spiritual Promotion appendant to it; and the Perſon himſelf hath formerly been eſteemed ſuch an eminent Dignitary in the Church, that *Philip* one of the Sons of *Lewis* the Groſſe King of *France*, took upon him the Office of *Archdeacon* of *Paris*.

(z) Still. Orig. Brit. 195.

'Tis

'Tis certain that an *Archdeacon* is a very ancient Officer in the Church, for we find that *Anaſtaſius*, in the Life of *Pope Sixtus* the 2d. called one *Laurentius Archdeacon of Rome*, who ſuffered in the Year 260; and *Pope Damaſus*, about one hundred Years afterwards, called *Stephen* the *Protomartyr* an *Archdeacon*.

St. *Jerome*, in his Epiſtle to *Evagrius*, (*a*) tells us that the *Deacons* choſe one of the moſt Eminent amongſt them whom they call *Archdeacon*; ſo that 'tis plain there were ſuch Officers about the end of the 4th Century, but they had not then any Juriſdiction in the Church, for they only attended the Biſhop at Ordinations and other publick Solemnities in the Cathedrals.

Afterwards when the Annual Viſitations of Biſhops came to be inconvenient, becauſe of the Grandeur and Charge of their Attendance and Retinue, when the *Chorepiſcopi* were laid aſide, becauſe they aſſumed thoſe Powers which did not belong to them, (for they were Perſons only appointed and conſecrated in the Primitive Times for the Eaſe of the Biſhops in Matters of Orders and not of Juriſdiction; but being always near their Perſons did encroach upon ſome of their Powers) and when the *Norman Biſhops*, by reaſon of their *Baronies*, were to attend the Kings in their Parliaments, then *Dioceſſes* were firſt divided in *Archdeaconries*, and the Biſhops ſent Archdeacons in their Room, who viſited when they did not; and Archbiſhop *Lanfrank*, who lived in the 11th Century, and in the Reign of *William* the Conqueror, is by ſome affirmed to be the firſt who gave an Archdeacon any manner of Juriſdiction.

But this doth not conſiſt with the (*b*) Conqueror's Writ, which is thus, (*viz.*) *Nullus Epiſcopus vel Archidiaconus de legibus Epiſcopalibus amplius in hundredo placita teneat*, which he tells us was an uſage *in regno angliæ uſq; ad mea tempora*, from whence it may be inferred, that *Archdeacons* had Juriſdiction here in the Times of our *Saxon* and *Daniſh* Anceſtors.

And Sir *Henry Spelman* is of the ſame Opinion, that *Archdeacons* in thoſe very Days had a ſuperintendent Power over all parochial Parſons in every Deanry in their Precincts.

What ever Juriſdiction they had before the Conqueſt, it cannot be denied but that they had ſome afterwards; for before the Clergy had any Proctors of their own they were repreſented in *Convocation* by the *Archdeacons*, to whom they gave Letters of Proxy to act in their behalf.

(*a*) Epiſt. 85. (*b*) Rights of Con. 331.

Thus

Thus it was *Anno.* 22 *H.* 1. which is the firſt Account we have of their being ſummoned to the *Convocation*; but *Anno.* 15. *H.* 3. they were ſummoned by expreſs Name, (*viz.*) there was *Ingens conſiſtorium Abbatum & Archdiaconorum* at St. *Albans*; and *Anno.* 32. of the ſame King he ſummoned *Magnates ſuos nec non Archidiaconos*, &c.

This being the Original of (*c*) *Archdeacons*, 'tis impoſſible for them to preſcribe to an Independency on the Biſhop, as it was declared in a Court of Law they might, and endeavoured to be proved by the Gloſs on a Legatine Conſtitution, where we read that an Archdeacon may have a cuſtomary Juriſdiction diſtinct from the Biſhop, and to which he may preſcribe.

But the meaning of it is not that there can be an Archdeaconry by Preſcription and independant on the Biſhop, but that the Archdeacon may preſcribe to a *particular Juriſdiction* exempt from the Ordinary, which Juriſdiction hath cuſtomarily been enjoied by him and his Predeceſſors time out of mind.

Thus the *Archdeacon* of *Richmond* (*d*) may preſcribe to grant Inſtitutions to Benefices, but he had that Power originally from the Biſhop, becauſe the Juriſdiction of the whole Dioceſs was in him before there was an *Archdeacon*, but the Grant which he had being loſt, and it being cuſtomary for him to inſtitute, by vertue (as it muſt be ſuppoſed) of ſuch Original Grant, he may therefore preſcribe to do it.

So likewiſe the *Archdeacon* of *Cornwall* hath a particular Juriſdiction to grant Probates of Wills, which other Archdeacons have not.

All theſe Juriſdictions are founded upon ancient Cuſtoms, but ſtill ſubordinate to the Biſhop, for ſo is the Archdeacon in our Law, and ſo he is likewiſe by the Canon Law, for he is *Vicarius Epiſcopi*; and no longer ago than in *Lyndwood*'s Time he had not power to paſs Cenſures in his own Name, but for ſome ſmall Fault, nor then neither, but where there was a Cuſtom to warant him ſo to do; he could not viſit *de communi jure*, but as the Canoniſts call it, *per modum ſcrutationis ſimplicis*, that is he could enquire into the Crimes but could not puniſh the Criminals.

But becauſe he hath in one Senſe, according to the Caſuiſts, a cure of Souls, by vertue of his Office, tho' 'tis *in foro exteriori tantum & ſine paſtorali cura*, and having Authority to perform miniſterial Acts, as to ſuſpend, excommuni-

(*c*) 2 Vent. 189. 263. (*d*) 2 Rol. Rep. 150. 449.

cate,

cate, abſolve, *&c.* therefore by the Eccleſiaſtical Law he he is obliged to reſidence.

But he hath no *parochial Cure*, and therefore an *Archdeaconry* is not comprehended under the Name of a *Benefice with Cure*; for if one who hath ſuch a Benefice accepts an Archdeaconry 'tis not void by our Law, tho' 'tis ſo by the Canon Law, and that may be the Reaſon of the Proviſo in the Statute 21 *H.* 8. *cap.* 13. by which 'tis enacted, that it ſhall not be taken under that Name.

And as he hath a Juriſdition in certain Caſes, ſo for the better exerciſing the ſame, he hath power to keep a (*e*) Court which is called the Court of the Archdeacon, or his Commiſſary, and this he may hold in any place within his Archdeaconry, and there he may determine Spiritual Cauſes, but ſuch Judgment is not final, for there lies an Appeal from his Sentence to the Biſhop of the Dioceſs, and not to the Arches, becauſe the Archdeacon's Power was derived from the Biſhop, and therefore his Acts muſt be ſubordinate to him.

There is an Officer belonging to this Court, called a Regiſter, (*f*) whoſe Office concerns the Adminiſtration of Juſtice, and therefore the Archdeacon cannot by Law take any Money for granting it, if he doth the Office will be forfeited to the Queen and not to the Biſhop; that is, the Grant is void, and becauſe the Archdeacon hath by this means diſabled himſelf, therefore the Power to ſupply the Office is devolved upon the Queen as Supreme Ordinary.

Laſtly, He claims *Synodals*, which is a Tribute paid to him by the inferior Clergy for his *Eaſter* Viſitation; 'tis paid by no certain Rule that I can find, but by ſome ancient Taxation of which there are no Footſteps.

Sir *Simon Degg* is of Opinion, that it may be paid as a Contribution to their Charge in attending the *Synods*, they being, in former Times, choſen by the Deacons, and ſent thither as their Repreſentatives;

But if I may have leave to conjecture it was thus: 'Tis a Tribute originally given to the Biſhop, at the aſſembling a Synod within his Dioceſs, which he was formerly obliged to do once a Year, and then a certain Sum was paid to him by the Clergy, as a Token of their Subjection.

Thoſe Synods were uſually held in the Cathedrals, and the Biſhops preſided in them, but after the Conqueſt his Attendance being required at the King's Court, 'tis proba-

(*e*) 4 Inſt. 339. Hob. 16. 24 H. 8. cap. 12. (*f*) 3 Lev. 289. 2 Deut. 187.

ble

ble he might delegate Archdeacons to ſit in his Room, for they being always near the Biſhop had very much improved their Intereſt and Power with him, and from thence 'tis that Archdeacons claim *Synodals* at this time *De jure communi Eccleſiaſtico*, which they originally had by Agreement and Compoſition with the Biſhop; which Compoſitions being now loſt, and the Duty being conſtantly paid, they now claim it by Preſcription.

But ſtill they pay a yearly Sum to the Biſhop, *Pro exteriori Juriſdictione*, and this is called Preſtation Money.

Arches.

THIS is the ancient *Conſiſtory Court* of the Archbiſhop of *Canterbury*, and 'tis called *Curia de Arcubus* from *Bow-Church*, where it is kept; and that Church was ſo called, becauſe the Steeple was formerly raiſed upon Stone Pillars built on Arches like ſo many Bows bent.

Here Spiritual Cauſes are debated by *Civilians*, and determined by the Judge who is called *Dean of the Arches*, becauſe he hath a peculiar Juriſdiction over Thirteen Pariſhes in *London*, which is eſteemed a Deanry, and exempt from the Juriſdiction of the Biſhop of *London*, of which the *Pariſh* of *Bow* is one and the chiefeſt.

But the Juriſdiction of this Judge extends thro' the whole Province of *Canterbury*; ſo that, upon an Appeal made, he ſends out a *Citation* to the *Appellee*, and his Inhibition to the Judge, from whoſe Sentence the Appeal was made, but he is prohibited by the 4th *Canon* to cite any one who doth not dwell in the particular Dioceſs, or peculiar of the Archbiſhop, without the Licenſe of the Dioceſan firſt had and obtained, except only in ſuch Caſes which are expreſſed and reſerved in the Statute 23 *H.* 8. *cap.* 9. that is for *Hereſie*, &c. the Judge offending, ſhall be ſuſpended from the Exerciſe of his Office for three Months.

My (*g*) Lord *Coke* tells us the *Dean of the Arches* hath ordinary Juriſdiction in Eccleſiaſtical Cauſes at the firſt Inſtance of the Party, and by way of Appeal thro' the whole Province of *Canterbury*, but that his Power to call any Perſon out of any part of his Province, who lives in another Dioceſs, is now reſtrained by that Statute, unleſs it be upon an Appeal,

(*g*) 4 Inſt. 337.

Artiſees

Articles of Religion.

IN the Reign of *H.* 8. there was a Book publiſhed, which was called *The neceſſary Erudition of a Chriſtian Man*; the Deſign of it was to expoſe the Errors of the Church of *Rome*, and to condemn thoſe Doctrines which had been generally received by the People, but there was no Aſſent or Subſcription required to this Book.

In the next Reign, when the Worſhip was more reformed, then were the Articles of Religion prepared; and 'tis generally thought, by *Archbiſhop Cranmer* and *Biſhop Reydley*; the Manuſcript was ſigned by both Houſes of Convocation, and publiſhed in the laſt Year of *Ed.* 6.

Theſe Articles were reviewed by the Biſhops of both Provinces, and by the Convocation aſſembled in the 4th Year of the *Queen*, and were then re-publiſhed; and about Nine Years afterwards they were re-viewed a ſecond time by *Archbiſhop Parker*, and ſubſcribed by him and Ten other Biſhops in a provincial Synod, as containing true and ſound Doctrine; and theſe original Manuſcripts were given by that Archbiſhop to *Corpus Chriſti College* in *Cambridge*, where they now remain.

They are Thirty Nine in Number, and are Articles of *Church Communion* as to the (*h*) *Laity*, and by the Canon 'tis decreed, that whoſoever ſhall affirm that they are in any Part ſuperſtitious or erroneous, or ſuch which may not with a good Conſcience be ſubſcribed, ſuch Perſons is *ipſo facto* excommunicated.

This Canon relates to the whole Body of the People, in which the Clergy muſt be comprehended: And the learned *Biſhop of Sarum* tells us, that every Perſon who, doth not think ſome Propoſition in them to be very erroneous, even to ſuch a degree that he cannot hold Communion with thoſe who aſſent to them, muſt, and is obliged, to continue in our Communion.

But the Legal Subſcription is enjoined by a (*i*) Statute which eſtabliſhes theſe Articles, and requires every Clergyman to declare his Aſſent, and *ſubſcribe* them in the *Preſence of his Ordinary.*

This being done he muſt bring a Teſtimonial or Certificate from the Biſhop of ſuch his Aſſent and Subſcription,

(*h*) Can. 5. (*i*) 13 Eliz. cap. 12.

and

and muſt publickly *read* the Articles in the Church where he is to ſerve, and declare his unfeigned Aſſent to the ſame, and this he muſt do within *two Months* after his Induction, accounting twenty eight Days to the Month, or elſe he is *ipſo facto* (*k*) deprived, and a general Pardon will not reſtore him.

And this Subſcription muſt be conſidered as a Declaration of the Opinion of the Subſcriber; and therefore if he declare that he ſubſcribes and aſſents to the (*l*) Articles, ſo far forth as they are agreeable to the Law of God 'tis not good.

'Tis true, the Form of the Subſcription is not ſet down in the (*m*) Statute, but by the Canon 'tis expreſly required, that he ſubſcribe and allow the Book of Articles, and that he acknowledge every Article to be agreeable to the Word of God.

Thoſe who diſſent from our Church cannot ſubſcribe to the 3*d Article* as agreeable to the Word of God, (*viz.*) *As Chriſt died for us, and was buried, ſo alſo is it to be believed that he went down into Hell*, for they cannot believe the Local Deſcent of Chriſt into Hell, which theſe Words ſeem to import, becauſe none of the Evangeliſts mention it; and they ſay 'tis improbable ſo remarkable a Tranſaction would have been omitted by them, and by the Fathers who lived in their Days and ſoon after them.

The aforeſaid *Biſhop of Sarum* tells us, that theſe Words, (*viz.*) *He went into Hell*) will admit of three different Conſtructions both in the Letter and and in Grammar.

(1.) The *Local Deſcent*, and that is implied by the *Engliſh* Word *Hell*.

(2.) The *Grave* according to the Signification of the *Hebrew* Word.

(3.) The Place of Spirits ſeparated from their Bodies according to the *Greek* Word.

So that a Man may ſubſcribe to this Article, if he apprehend it in either of theſe Senſes.

But to return to Subſcriptions required by the Clergy, Sir *Symon Degg* adviſes them to have ſome credible Witneſſes preſent when they ſubſcribe before the Biſhop; and that thoſe Witneſſes do atteſt the Biſhop's Certificate of ſuch Subſcriptions; and that they get two Books of Articles, and give one to a Pariſhioner to read with them, and them to atteſt the Book after this manner:

(*k*) 2 Lev. 101. Cro. Eliz. 690. 8 Rep. 29. 2 Inſt. 274. (*l*) Cro. Eliz. 252. Noy. 150. (*m*) Can. 36.

1 *Ri*

I *R. B.* was preſent on ſuch a Day in the Pariſh Church of *H.* in the County of *S.* and heard *J. S.* then and there read the ſaid Thirty Nine *Articles* during the time of Divine Service, and declare his unfeigned Aſſent and Conſent to all the Matters therein contained; and he adviſes the Clergyman to keep the *Articles* thus ſubſcribed by the Pariſhioner.

But if he neglect till the two Months are expired, then he adviſes him to get the Queen's Title *Ad Corroborandum* as he calls it, and afterwards to perfect his former Neglect.

In theſe Caſes of Deprivation the Patron muſt have perſonal Notice from the Biſhop, and the firſt Caſe which happen'd upon this Statute was to this very purpoſe, and it was about five Years after it was made, which was this: One (*n*) *Thwaites* was preſented by an Abbot in the Reign of *H.* 8. and was afterwards deprived for not reading the Articles; the Biſhop of *Carliſle*, in whoſe Dioceſs the Benefice was, ſent a Mandate to the Curate of that very Church to be read there, purporting that *Thwaites* had not ſubſcribed the Articles, and this was read in the Church and fixed on the Door; but yet it was not a good *Notice* of the Deprivation, for the Biſhop ought to give perſonal Notice to the Patron before he could have a Title to preſent by Lapſe.

A Parſon having one (*o*) Benefice with Cure accepts another, to which he was inducted, but did not *ſubſcribe* the Articles after his Induction as required by the Statute; the firſt Benefice is not void by the Acceptance of the ſecond, becauſe he was never a lawful Incumbent on it; for *not ſubſcribing* the Articles made his Admiſſion to the ſecond Living void, and by Conſequence there was no Cauſe for looſing the firſt Benefice.

But if after Admiſſion into the ſecond (*p*) Living he had *ſubſcribed* the Articles, then he had been perfect incumbent *pro tempore*, *viz.* for two Months, tho' he had not *read* them; and ſo by taking the ſecond Living the firſt was void; and by not *reading* them within two Months after his Induction into the ſecond Living that was void likewiſe.

About ſix Years after *Thwaites*'s (*q*) Caſe a *Quare impedit* was brought upon the Queen's Title to preſent to the Rectory of *Haverſham* in the Dioceſs of *Lincoln* for that *Aſhton*, the laſt Incumbent had not read the Articles; but becauſe it was

(*n*) Dyer 346. (*o*) Dyer 379. b. Vaugh. 132. (*p*) Vaugh. 133. Hob. 137. (*q*) 1 And. 62.

not

not ſaid that the Church of *Haverſham* was a Church (*) *with Cure, &c.* the Declaration was ill.

If the Key of the Church cannot be had, 'tis ſufficient to read the (*r*) Articles in the Church-porch, in the time of Divine Service.

The Proof in this (*ſ*) Caſe may be of a Negative, which is not uſual in other Caſes; for if a Parſon ſue for Tythes, and the Pariſhioner pleads that he did not read the Thirty Nine Articles, he muſt prove it, becauſe the Law doth preſume the Affirmative, (*viz.*) that the Parſon did read them.

So in (*t*) Ejectment for a Rectory, *&c.* 'tis ſufficient if the Parſon proves his Admiſſion, Inſtitution and Induction, without Proof that he read the Articles.

Audience.

IN former Days the *Archbiſhop of Canterbury* did hear Spiritual Cauſes in his *Palace*, for which purpoſe he had a Court there called a *Court of Audience*.

But before he came to any Determination, he adviſed with Perſons learned in the Civil and Canon Laws, who from thence were called his Auditors.

Afterwards one Perſon was thought to be ſufficient in this Matter, and he obtained the Name of *Auditor audientiæ Cantuarenſis*, and the Court was called *Curia Audientiæ*.

This *Auditor* derived his Authority from the Archbiſhop, and his Juriſdiction was equal to that of the Dean of the Arches, tho' he was inferior to him both in Dignity and Antiquity; for by a ſpecial Commiſſion he is made Vicar-General to the Archbiſhop; and by Vertue thereof he hath all Spiritual Juriſdiction in any Dioceſs within his Province, *Sede vacante*, and this he might execute, either by himſelf or his Commiſſary, and might cite any Perſon out of ſuch Dioceſs without Danger of the Statute 23 *H.* 8. becauſe the Archbiſhop in ſuch Caſe is Ordinary of that Dioceſs.

But generally matters only (*u*) *pro forma*, were tranſacted in this Court by the Archbiſhop himſelf as concerning Confirmations, Elections, and Conſecrations of Biſhops, and Matters of voluntary Juriſdiction, and *ex officio*, as

* 2 Lut. 1089. (*r*) 1 Lev. 191. (*ſ*) 1 Rol. Rep. 83. (*t*) Sid. 226. (*u*) 4 Inſt. 377.

granting

granting the Guardianſhip of Spiritualities, Admiſſions and Inſtitutions to Benefices, *Sede vacante*, and diſpenſing with Bans of Marriage, but now this Court is not ſo much in uſe as formerly.

Avoidance.

THIS, as 'tis oppoſed to Plenarty, is where there is a Want of a lawful Incumbent on a Benefice, during which Vacancy the Church is *Quaſi viduata*, and the Poſſeſſions belonging to it are in *Abeiance*.

The Cauſes of Avoidance are more by the Canon Law than they are by the Common Law; and tho' thoſe Laws agree in many of ſuch Cauſes, yet they differ in ſome, as for Inſtance: If a Layman is preſented to a Church, 'tis void by the Canon Law, but the Capacity of the Perſon is not ſo much conſidered by the Common Law, as his Inſtitution and Induction; for by thoſe Acts the Church is full, and ſhall not be void, but from the Time of the Deprivation of the Incumbent for his Incapacity.

Avoidances are either in *Fact or Law:* The firſt and moſt natural is by *death* of the Party, and in ſuch Caſe the Patron muſt take Notice of the Avoidance, ſo as to preſent within the ſix Months.

Then there is an Avoidance by *Ceſſion*, *Plurality*, *Deprivation*, *Incapacity*, *Union*, *Symony*, *&c.* theſe are Avoidances in Law, and of ſuch no Title accrues to the Patron.

There are alſo Avoidances by the (*x*) Act of the Party as by *Reſignation*, and there the Ordinary muſt give Notice to the Patron before he can have a Title to preſent by Lapſe.

(1.) There are likewiſe Avoidances by Act of Parliament, as if Tenths due to the Queen are demanded at the Houſe or Church of a (*y*) Clergyman, by ſuch who are charged to collect them, and not paid in Forty Days, then upon the Biſhop's Certificate thereof into the *Exchequer*, the Perſon is *ipſo facto* deprived.

(2.) If a beneficed Perſon is convicted in maintaining any foreign (*z*) Power by his preaching.

(3.) He who maintains a Doctrine contrary to the Thirty Nine (*a*) Articles, and being ſummoned before the Ordinary doth perſiſt in it, may be deprived by him.

(*x*) Dyer 327. (*y*) 26 H. 8. cap. 12. (*z*) 1 Eliz. cap. 1. (*a*) 13. Eliz.

(4.) So an Officer taking (*b*) Money or any Reward for admitting, inſtituting, or inducting, *&c.* looſes two Years Profits of the Benefice, according to the true Value, and that the Benefice ſhall *eſtſoon be void.*

(5.) So if any Clergyman, who ſhall be preſented by either (*c*) Univerſity to a Living in the Gift of a Papiſt, if he ſhall abſent himſelf ſix Days, the Benefice ſhall be void.

(6.) So a Clergyman omitting to take the (*d*) Abjuration Oath within three Months after entry on a Benefice, 'tis void.

Theſe Statutes are differently penned, as to the Avoidance, for ſome are, that the Clerk ſhall be *deprived*, that he ſhall *loſe his ſpiritual Promotion*; that his Benefice *ſhall be void*, that it ſhall *eſtſoon be void*, and that he ſhall be *ipſo facto* deprived.

Now in all theſe Caſes, but the laſt, there muſt be a Sentence judicially pronounced to make the Living void; and the Canoniſts affirm it muſt be ſo in the laſt Caſe, unleſs the Legiſlators Minds do more fully appear, as by thoſe Words; That the Benefice ſhall *be void, ſo that it ſhall le lawful to preſent another*; and they ſay that where the Words are, a Man ſhall be *ipſo facto* deprived, he only loſes the Title which he had to the Benefice, but may keep the Poſſeſſion till Sentence of Deprivation.

'Tis true, there hath been a Reſolution in a Court of Common Law, agreeable to the Opinion of the Canoniſts, in the firſt of theſe Caſes, and it was upon the Statute 21 *H.* 8. *cap.* 13. which enacts, that if a Man takes two Livings incompatible, and is inducted into the ſecond, the firſt *ſhall be void, and the Patron ſhall preſent another, as if the Incumbent had been dead*; this is an Avoidance without a Declaratory (*e*) Sentence of Deprivation; and ſo 'tis in our Law, where the Words are that the Party ſhall be (*f*) *ipſo facto deprived*, tho' the Canoniſts are of another Opinion.

The different penning of Acts of Parliament of this Nature is farther to be obſerved in the Caſes following: Where an Act declares the *Admiſſion, Inſtitution, and Induction to be void*, as it doth where a Man is made a (*g*) Prieſt under Twenty Three Years of Age, there 'tis void without a Sentence of Deprivation.

(*b*) 31 Eliz. cap. 6. (*c*) 1 Willi. cap. 26. (*d*) 13 W. 3. cap. 6.
(*e*) Moor 542. (*f*) Deg. [illegible] (*g*) 13 Eliz. cap. 12.

But if a (*b*) Statute makes a Man incapable of a Benefice, under the Penalty of a pecuniary Forfeiture; as for Inſtance: That no Perſon ſhall be capable of any Eccleſiaſtical Promotion, before he is ordained Prieſt, under the Penalty of 100*l.* that doth not make the Admiſſion void, and by conſequence there is no Occaſion of any Sentence.

Laſtly, 'Tis to be obſerved, that in all Caſes of Avoidance, by Act of Parliament, the Biſhop ſhall not collate by Lapſe, but from the time of *Notice* given to the Patron, unleſs 'tis ſpecially provided by the Act to the contrary.

The next thing to be conſidered is, who ſhall have the Profits during an Avoidance; and as to that matter it hath been held, that the Houſe and Glebe are in abeiance; and formerly it was held, that if the Incumbent had lived till Lady Day, he might diſpoſe the Tythes of the Summer following by his Will.

But now, by the Statute, 28 *H.* 8. *cap.* 11. the Profits ariſing, during the Avoidance, are given to the next Incumbent, towards Payment of the Firſt Fruits; and the Ordinary, who hinders him, forfeits treble Damages, to be recovered by ; but ſuch Ordinary may receive the Profits to provide for the Service of the Church, and ſhall be allowed for the Charges of ſupplying the Cure, and carrying in the Tythes; and for this purpoſe the Churchwardens are uſually appointed under the Seal of the Court.

By the ſame Statute the Succeſſor is to have the Parſonage Houſe, and ſuch Glebe as is not ſown, and this he muſt have within a Month after Warning; but if the Glebe is ſowed, then the Incumbent may diſpoſe it by his Will, out of which Tythes muſt be paid to the Succeſſor.

So likewiſe if the Avoidance is by *Deprivation* or *Reſignation*, the Succeſſor ſhall have the Tythes of the *Glebe ſown*.

As the Advowſon it ſelf may paſs by Deed, ſo may the *next Avoidance*, but this muſt be where the Church is full; for where there is no Incumbent the void Turn is not grantable, becauſe 'tis a meer ſpiritual Thing; and during the Vacancy, 'tis only a Thing in Action; 'tis a Power or Authority of Nomination veſted in the Perſon of the Patron, and not the Advowſon it ſelf.

'Tis true, the (*i*) Queen by her Prerogative, may grant a thing in Action, but not in this Caſe; therefore where She is ſeized of a Mannor, to which an *Advowſon is appendent*, and the Church being void, She grants the Mannor with the *Advowſon*; the void Turn doth not paſs to the Grantee, becauſe it

(*b*) 14 Car. 2. cap. 4. (*i*) 2 Rol. Abr. 196.

was a Chattel veſted in the Queen; but if the Advowſon had been in groſs, and not appendent, 'tis otherwiſe.

A Grant of the next Avoidance is no more than a Chattel; for if 'tis granted to a Man, his Heirs and Aſſigns, it ſhall go to his Executors. But tho' 'tis only a Chattel, it will not paſs by the Words *bona & catalla*, becauſe thoſe general Words comprehend ſuch things which a Man hath in Poſſeſſion, but *jus præſentandi* is a future Right.

But if the (*k*) Grant is to a Man and his Aſſigns for his Life, and that it ſhall be lawful for him, during his Life, to preſent to the Church where it ſhall happen to be void, this is a limitted Grant; ſo that if there is no Avoidance, during his Life, his Executors ſhall not have it afterwards.

Juſtice Coke reports the ſame Caſe a little plainer; and he tells us, that the Grantee, for Life, died before the Church was void, and his Executor granted the next Avoidance to another, who preſented upon the Death of the laſt Incumbent, and the Iſſue was upon *non conceſſit*, which was found accordingly, for the grant was void.

There is a plain Difference between a Grant of an Avoidance, and the Grant of the *next* Avoidance; for the one is a thing in actual Poſſeſſion, and the other in Expectation.

But becauſe we often meet with Grants of the *next* Avoidance, I ſhall ſhew

(1.) Where ſuch Grants are void in themſelves.

(2.) Where they are made void by the Act of the Party, and where not.

(3.) Where they are made void by the Act of a Third Perſon, who is no Party to the Grant.

(1.) Where ſuch Grants are void in themſelves; and as to this, if Tenant in Tail of a Mannor to which an Advowſon is appendant, grants the *next* Avoidance, and dies before the Church becomes void; this Grant is not good, becauſe 'tis only a (*l*) Grant of a Chattel, for there can be *no Rent* reſerved upon ſuch a Grant.

So if Tenant in Tail of an Advowſon, and his Son and Heir join in a (*m*) Grant of the *next* Avoidance, and then the Father dies, this Grant is void as to the Son, becauſe he had nothing in the Advowſon, either in Poſſeſſion or Right, at the time of the Grant.

(2.) 'Tis void by the (*n*) Act of the Party, as where a Man grants *Proximam advocationem* when it ſhall happen to

(*k*) Jones 407. Cro. Car. 505. 2 Rol. Abr. 49. (*l*) 1 Rol. Rep. 190. 1 Bulſt. 31. (*m*) Hob. 45. (*n*) 1 And. 15 Dyer 130. Moor 249.

be

be void, and the Church was void at that time; this made the Grant void as to that very next Avoidance, but it ſhall be good for the next Turn after that.

But if he grant *Præſentationem* without ſaying *Proximam quandocunq; & quomodo cunq; Eccleſia vacare contigerit pro unica vice tantum*, and that the Grant ſhall be in force till a fit Clerk be admitted upon his Preſentation, if he doth not preſent upon the next Avoidance; this Grant is void, becauſe the Limitation being incertain, the Law will enforce the ſooneſt Execution of it; but if theſe (*o*) Words ſhould be conſtrued to give him Liberty to preſent when he will, it will be void for that very Reaſon, becauſe the Grantee could not then be barred, either by Lapſe or Uſurpation, which is contrary to the Nature of an Advowſon.

So if I grant (*p*) *Proximam advocationem* to Two, and afterwards the Church being void, one releaſes to the other all his Right, *&c.* this Releaſe is void, becauſe the next Avoidance was attached at that very time, for the Title was in both, and one could not then releaſe to the other.

But if the next (*q*) Avoidance is granted to two, and one releaſes to the other in the Life-time of the Incumbent; he, to whom the Releaſe is made, may bring a *quare impedit* in his own Name; becauſe during the Life-time of the Incumbent, the next Avoidance was only a thing in Intereſt, and might be releaſed, for it was not a thing in Action till the Church was actually void.

If (*r*) Leſſee for Years of an Advowſon grants the *next* Avoidance *which ſhall happen during the Term*, and then dies inteſtate, and his Adminiſtrator ſurrendered the Term to the Leſſor, then the Church becomes void, the Grantee ſhall preſent, notwithſtanding the Surrender of the Term, for it ſhall be intended to continue for his Benefit.

(3.) A Grant of the *next* Avoidance may be void by the act of a Third Party, who is a Stranger to the Grant.

As where the King makes a Parſon a Biſhop, in ſuch caſe he is to preſent by vertue of his Prerogative, ſo that the Grantee of the next Avoidance cannot have the next Turn;

Therefore where a Man gave (*ſ*) Bond conditioned to procure a Grant of the next Avoidance of an Archdeaconry for the Obligee, ſo that he might preſent, and the Archdeacon was made a Biſhop before the next Avoidance; by

(*o*) 1 Bulſt. 26. (*p*) And. 223. Owen. 85. Cro. Eliz. 173. 1 Leon. 167.
(*q*) Moor 467. Cro. Eliz. 600. (*r*) 8 Rep. 145. (*ſ*) 3 Leon. 151. 4 Leon. 61. Golds 41.

this means the Bond is forfeited, becauſe the King had a Title by vertue of his Prerogative to preſent to the next Turn.

BANS; *See Marriage.*

Baptiſm.

THIS is a Fœderal Admiſſion of Perſons into Chriſtianity, in which all the Bleſſings of the Goſpel are made over, on God's Part, to the Baptized; and thoſe who are admitted to Baptiſm, are by ſolemn Vows obliged to obſerve the Chriſtian Religion.

It is an Inſtitution by that Miſſion which Chriſt gave to his Diſciples to go and preach and make Diſciples, (*t*) *Baptizing them in the Name of the Father*, &c.

So that they were firſt to be made Diſciples, that is they muſt be firſt convinced that Chriſt is the *Meſſias*, and ſent of God to be the Saviour of the World; and when they ſtedfaſtly believed this Doctrine, then they were to be baptized, in order to be initiated in Chriſtianity, and obliged to renounce Heatheniſm.

By the Moſaical Diſpenſation Circumciſion was a Fœderal Admiſſion to the *Jewiſh* Religion, and that being taken away, Baptiſm was inſtituted in its ſtead; which tho' in Circumſtances not agreeable to Circumciſion, yet both are a-like in their reſpect, (*viz.*) that both were the reſpective Rites of Admiſſion into the ſeveral Covenants, and thereby the Covenantees became entituled to the reſpective Privileges which were annexed to them, and in both Caſes they were obliged to obſerve the whole Law to which they were reſpectively initiated.

And tho' Baptiſm was not uſed amongſt the *Jews*, yet they had a Notion of it (as we are told by learned Men) and of the manner of performing it; for when St. *John* baptized others, and they would know who he was, he told them he was not the *Meſſias*, nor *Elias*, &c. they immediately replied, *why doſt thou then baptize?* From which Words 'tis natural to infer, that if he had been either of thoſe Perſons, he might have baptized; and it was uſual amongſt them, when an Heathen was converted to Judaiſm, to waſh

(*t*) Matt. xxviii. 19.

the

the Convret, which was an Emblem of Purification from his former Idolatry and Entry into their Religion.

The Perſons afterwards baptized by Chriſt were firſt led to the Water, and laid naked therein, as a Man is laid in his Grave, and without any Garments, but only ſuch which might cover the natural Secrets, and then theſe Words were ſpoke, *I Baptize thee*, &c.

And from this Example, Baptiſm in the Primitive Times was uſually in Rivers and Fountains, which might be convenient enough in the *Eaſtern* Countries, becauſe the Converts were not only many, but Men of Years.

And with us here in (*u*) *England* we have an Account, that when the *Saxons* were firſt converted to Chriſtianity, many were baptized in the River *Swale*; and our Hiſtories mention, that *Paulinus the firſt Archbiſhop of York*, when he converted the *North* Part of *England* to Chriſtianity, baptized ſeveral in the Rivers *Darwent* and *Humber*.

When the Cuſtom of baptizing in Rivers and Fountains was diſcontinued, the People made little Veſſels in their Houſes to hold the Baptiſmal Water, and from thence they were called *Fonts*.

Afterwards, when the (*x*) *Chriſtians* were perſecuted, they baptized People in Woods, and when the Perſecution ceaſed they came nearer to the Churches, and placed their Fonts at a little Diſtance, then they got Leave to ſet them in the Church Porch, and ſo by degrees placed them in the Churches, but not in every Church, for at firſt they were only in Cathedrals; and tho' the Service might be performed in the Country Churches, yet Baptiſms and Burials were only in the the great Churches, unleſs in caſes of Neceſſity.

When theſe *Fonts* firſt got into the Churches they were placed at the Entrance, and the People went down a few Steps to them, and they were ſo large, that thoſe who were baptized, were dipped in the Water; but when Immerſion was no longer uſed, *Fonts* were ſtill kept up in the Churches, tho' not ſo large as before; and this ſhews that Baptiſm was anciently to be celebrated, not only in Churches, but in the moſt publick Place thereof, (*viz.*) at the very Entrance into it, and this may be the reaſon why 'tis enjoined by the (*y*) *Canon* to be adminiſtred in Churches and not in private Houſes, unleſs in caſes of Neceſſity, as where the *Child* is ſick.

(*u*) Bede lib. 2. cap. 14. (*x*) Rydly's View, &c. 238. (*y*) Canon 71.

The learned Biſhop of *Worceſter* tells us, that whilſt the ancient Diſcipline was kept up, Baptiſm could not be adminiſtred privately, becauſe it was never celebrated but in the great Feſtivals of the Year; but this muſt be underſtood of Perſons converted to *Chriſtianity* by preaching, and not of Infants; for ſuch who came to be baptized, were to be examined in the Face of the Church; but when whole Nations were converted, and Infants were baptized, the moſt regular and ſolemn Method was to baptize them in Churches.

Now as to baptizing Infants, I agree there is no poſitive Rule for it in the Scripture; yet ſince Chriſt conformed his Inſtitutions in ſome Meaſure agreeable to the Laws of the *Jews*, 'tis reaſonable to believe, that where he gave no expreſs Command to the contrary, ſomething like their Diſpenſation ſhould continue.

In all Ages Parents had a natural Power and Authority over their Children, therefore they are entruſted by the Laws of Nations to look after their civil Rights; and 'tis for this reaſon that all Contracts which they make in the behalf of their Children, being Infants. *and which are for their Advantage*, ſhall not be avoided by them when of full Age; and if they have ſuch a Right in temporal Affairs, 'tis highly reaſonable that they may dedicate their infant Children to God, and the rather, becauſe in the New Diſpenſation nothing is ſaid againſt baptizing Infants, therefore it may ſeem reaſonable, that both Diſpenſations ſhould agree in this, (*viz.*) that as Infants were circumciſed formerly, ſo they may be baptized now.

The firſt Debate about this matter was in the beginning of the Reformation, for *Anno* 3 *Ed.* 6. ſeveral *Germans* came hither, who held that Infants ought not to be baptized, becauſe they were not capable of Inſtruction; and this Opinion they grounded upon the firſt Inſtitution of Baptiſm beforementioned, which was, that the Diſciples ſhould firſt preach and then baptize the People.

Theſe were called the *Moderate Anabaptiſtis*; but there were more of that Sect who denied all the Principles of the *Chriſtian Religion*, and theſe were Men of fierce and rebellious Tempers, they had rebelled in *Germany*, and raiſed that War which was called there the *Ruſtick War*; they took *Munſter*, and made *John* of *Leyden* their King, whom they called the *King* of the *New Jeruſalem*.

There was a Commiſſion directed to Archbiſhop *Cranmer* and others, to enquire concerning theſe Men and their Converſation,

verſation, and to endeavour either to reclaim, or to excommunicate and commit them.

Amongſt theſe *Joan Bocher*, commonly called *Joan* of *Kent* was one, who held that Chriſt was not incarnate of the Virgin, becauſe her Fleſh was ſinful, and therefore he could not partake of it.

The Archbiſhop, and the reſt of the Commiſſioners, could not prevail with her to renounce this Error, therefore ſhe was adjudged an *Heretick*, and delivered over to the ſecular Power for Puniſhment.

The King ſigned a Warrant for her Execution by burning, but with Tears in his Eyes, telling the Archbiſhop (who perſwaded him to it) that if he did wrong he muſt anſwer it to God; the Woman was burnt, and no part of that Archbiſhop's Life expoſed him more than this did.

But to return from this Digreſſion, there is now a Form of Baptiſm enjoined by the Law which muſt be obſerved, and the Miniſter cannot refuſe, or delay to baptize a *Child* according to that Form, being brought to the Church, either on a (z) Sunday or Holy-day, if he doth, the Biſhop may ſuſpend him for three Months.

But if the * *Child* is in danger of Death, and the Miniſter refuſeth to go to the Houſe, being deſired, and the *Child* dieth unbaptized, he ſhall be ſuſpended in like manner, and ſhall not be reſtored till he hath acknowledged his Fault before the Biſhop, and promiſed to do ſo no more; but where there is a *Curate* this Puniſhment ſhall not extend to the Parſon.

Now ſince Baptiſm is made a neceſſary means to Salvation, a Suſpenſion for three Months ſeems to be a very ſlender Puniſhment for a Miniſter, where a *Child* dies unbaptized thro' his Negligence or Omiſſion.

By the (a) *Canon* a Parent is not to be admitted Godfather to his *Child*, nor any other Perſon, before he hath received the Sacrament: We have not many Inſtances of Proſecutions, either for Neglects of this Nature, or for baptizing in any other Form than what is enjoined by Law; ſome we have, as for Inſtance:

A Man was convicted for baptizing a *Child* in another Form, and was indicted a ſecond time for the like Offence, and had Judgment to ſuffer Impriſonment for a Year, and to be *ipſo facto* deprived of all his ſpiritual Promotions, and, upon a Writ of Error brought, this (b) Judgment was rever-

(z) Can. 68. * Idem. (a) Canon 29. (b) Godb. 118.

ſed,

ſed, becauſe the firſt Conviction was not ſet forth in the Indictment.

And as Miniſters have been proſecuted for baptizing in a different Form than what is required by Law, ſo they have proſecuted their Pariſhioners for a Fee due to them upon Baptizing in the regular Way; but I cannot find that there is any thing due for it, by vertue of any Cuſtom or otherwiſe; and therefore where the *Curate* of (c) *Bridlington*, in *Yorkſhire* libelled againſt his Pariſhioner for a Shilling, as due to him for Baptizing his *Child*, a Prohibition was granted.

By the ancient *Canons* it was Symony to take any thing for Sacraments, becauſe they ought to be adminiſtred freely; but the *Canoniſts* themſelves taught the *Clergy* to evade their own Laws; for they told them, that tho' they ought not to take any thing for Baptiſm, yet they might ſell the Water to the Parents before it was conſecrated.

This is one of the worſt of their Evaſions, for Water is an Element free and in common to all Mankind for their neceſſary Uſe and Conveniency.

So that a Miniſter ought not in any caſe to be paid for Baptiſm, 'tis his Duty to baptize in the Church; but if the *Child* is in danger of Death he is obliged to go to the Houſe, *&c.* but if he baptiſes in a private Houſe where the *Child* is likely to live, and he is paid for his Journey thither, 'tis as bad as being paid for the Water, becauſe 'tis contrary to his Duty to adminiſter Baptiſm in ſuch Caſes.

Baſtardy. a Greco verbo Baſtazo (l. 9. Mozartix)

CAUSES concerning *Marriage* were at firſt tried in the Temporal Courts, but afterwards, by the Conceſſion of Princes, ſuch Cauſes were determined in the Spiritual Courts, and for that reaſon it was thought neceſſary, that the Violation of Marriage ſhould be determined there; and as to this Matter they diſtinguiſh between

General and Special } *Baſtardy.*

Where a Sute is commenc'd in a Temporal Court for an Inheritance, and the Defendant pleads in diſability that the

(c) 2 Lut. 1030.

Plain-

Plaintiff is a Baſtard, this muſt be tried in the Spiritual Court, and this is called *General Baſtardy*; for the Iſſue muſt be joined upon it, and tranſmitted by the Queen's Writ to the Biſhop, who is to try it in his Conſiſtory Court, not according to the Canons, but purſuant to the Rules of the Common Law, for theſe Laws differ in this matter, (*viz.*) By the Canons he is no Baſtard who is born before Marriage, if the Parents afterwards intermarry; but 'tis otherwiſe by the Common Law, for ſuch a Child is a Baſtard.

When the matter is tried by the Biſhop he is to certifie it under his Seal to the Queen's Juſtices, which Certificate is concluſive to them, for they are to give Judgment as 'tis found there.

But where the principal Matter of the (*d*) Sute is concerning Baſtardy it ſelf, as if an Action of Slander is brought for calling the Plaintiff *Baſtard*, and the Defendant juſtifies that he is a Baſtard, it ſhall be tried by the Country, and this is called *ſpecial Baſtardy*.

As for the Derivation of the Word, we have it from the *Germans*, who more properly write it *Baſtart*; for *Bas* ſignifies in that and other Languages (mean) and (*Start*) in the *Saxon* Tongue, ſignifies *riſen*, ſo that the Words import meanly riſen, or baſe born.

But it was not always a Name of Reproach, for it was formerly a Term of Honour in ſome Places; and the learned (*e*) *Gloſſographer* tells us, That in ſome *Northern* Countries they admitted Baſtards into Succeſſion, and that might be the reaſon why our firſt King *William* took upon him that Name, for he began his Letter to *Alan* Earl of *Breteigne* in this manner: *Ego Willielmus cognomento Baſtardus.*

In our Law he is thus defined, (*viz.*) one who is born *ex illicito concubitu*, as for Inſtance; if a Man hath (*f*) Iſſue by a Woman, tho' he afterwards marry her; ſo if he hath Iſſue by a ſecond Wife, when the firſt is living; or if he hath Iſſue upon Marriage, within the prohibited Degrees, but not till a Divorce, for the Marriage is not void, but voidable.

Both by the Civil and Canon Law, a Child born *before Marriage* might inherit, if the Marriage followed, and this was attempted (*g*) *Anno* 20 *H.* 3. to be made the Law of *England*, the Biſhops all concurred, becauſe it was the (*h*) Law of the Church, but the Temporal Lords would not admit it.

(*d*) Hob. 179. (*e*) Spelm. in verbo. (*f*) 1 Rol. Abr. 357. (*g*) H. 3. cap. 9. (*h*) 2 Inſt. 97.

'Tis

'Tis generally held, that *pater eſt quem nuptiæ demonſtrant*, and therefore in our Law thoſe who are begotten before, and born after Marriage are not (*i*) Baſtards, unleſs 'tis apparent that they cannot be the Iſſue of that Marriage, as if the Husband is beyond Sea for two Years before the Birth; or if he is but Fourteen Years of Age or under; or if he is ſick in Bed at the time of the Marriage, and ſo continues, and the Wife is delivered in a quarter of a Year afterwards.

But if by any Poſſibility it may be the Child of the Husband, then tho' born after Marriage, the Child, by our Law, is called *Mulier*;

As if the Wife live in Adultery, and hath Iſſue by another Man; yet if by Poſſibility the Husband had acceſs to her, it ſhall be preſumed his Child.

So if the Child is born but three Days after the Marriage 'tis legitimate.

By the Civil Law there are five ſorts of Baſtards.

(1.) Thoſe who are born in Fornication between ſingle Perſons, without any ſubſequent Marriage, and thoſe are called *Filii naturales*.

Mr. *Cambden*, in the Life of *Queen Elizabeth*, tells us, That the People made ſeveral Jeſts on theſe Words, being in the Statute which prohibited any Perſon, during her Life, to aſſert who is, or ſhould be her Heir or Succeſſor (except her *natural Iſſue*) which Words he tells us, were put in that Act, by the Power of the *Earl of Leiceſter*, that he might impoſe a Baſtard of his own upon the *Engliſh*, inſtead of the Queen's *natural Iſſue*.

(2.) *Spurii*, thoſe are Baſtards whoſe Fathers never intended to keep the Women as Concubines, but to leave them for others, and therefore the Father cannot be known but by Confeſſion of the Mother.

(3.) *Manſer*, and that is a Baſtard born of a common Strumpet.

(4.) (*Nothus*) He who is begotten of a married Woman, and who is called *Nothus*, becauſe the Marriage ſhews who he is.

(5.) Thoſe who are begotten between Perſons prohibited to marry, either by reaſon of Conſanguinity or Affinity.

But the common Lawyers only take Notice of three of thoſe Baſtards, which they comprehend by theſe Verſes.

(*i*) 1 Rol. Abr. 359.

Man-

Manſeribus ſcortum, Notho Mæchus dedit ortum,
Ut ſeges a ſpica ſic Spurius eſt ab amica.

By the Canon Law a Baſtard is prohibited from taking Orders, and is made incapable of any Eccleſiaſtical Benefice, for the Reaſons following;

Becauſe the Dignity of the Sacraments ought not to be committed to infamous Perſons;

2. Becauſe Children inherit the Vices of their Parents, therefore Baſtards are to have no ſpiritual Promotion in Deteſtation of their Parents Crimes.

But the Pope uſually diſpenſed with theſe Canons; yet when one *Morgan*, the natural Son of *H.* 2. begotten by him, on the Wife of Sir *Ralph Blewett*, was elected *Biſhop of Durham*, the Pope would not grant him a Diſpenſation, unleſs he would acknowledge himſelf to be the Son of *Blewett*, which he refuſed, and by conſequence had not the Biſhoprick; for being a Baſtard he was incapable of it without a Diſpenſation.

By the Civil Law he is made incapable of all Teſtamentary Benefit, either from Father or Mother; but by a Canon Law he may take, by a Deviſe, any reaſonable Competency for his Maintenance.

But both by the Common Law and Statute he is allowed a Maintenance; for by the one any Man is permitted to give his Baſtard Lands or Tenements by his Will, and the other hath provided for his convenient (*k*) Maintenance and Relief, by the Parents, and yet he is of no Conſideration in the Common Law, for he is not accounted of the Blood, ſo as to Raiſe an Uſe, and therefore natural (*l*) Affection is not a ſufficient Conſideration in ſuch Caſe.

He is not comprehended by the Name of Children in the Statute of Wills, he can have no Heir but of his very Body, and if he died without ſuch Heir his Lands ſhall eſcheat; and yet in ſome Caſes a Baſtard may gain the Right of Inheritance againſt a lawful Son; as if a Man, who is ſeized in Fee, hath an eldeſt Son, who is a Baſtard, and the youngeſt legitimate, by one and the ſame Woman, then the Father dies, and the Baſtard enters and hath Iſſue, and dieth without being diſturbed in his Life-time by him who was legitimate, he can never afterwards recover the Land, nor

(*k*) 18 Eliz. cap. 374. (*l*) Dyer 374.

any

any collateral Heir, in caſe there had been no ſuch Son, becauſe the Rule is (*m*) *Quod non eſt juſtum aliquem poſt mortem facere Baſtardum, qui toto tempore vitæ pro legitimo habebatur.*

But there are ſeveral Acts by which the legitimate Son may interrupt the Poſſeſſion of the Baſtard, as if he enter, or take any manner of Profits, by putting in his Cattle into the Ground, or otherwiſe, tho' no expreſs Words of Entry are uſed.

I ſhall conclude this Title with ſome few Obſervations:

(1.) Concerning the uſual Time of the Birth of a Child.

(2.) Concerning Suppoſitious Births.

And firſt as to the time of *Birth* of a Child, 'tis uſually *Nine Months and Ten Days* after the Conception, accounting Thirty *Days* to the Month; but 'tis natural if born at any time within Ten *Months* or Forty *Weeks*; yet by Accidents the Birth may be occaſioned ſooner or later, as where a Child was born Eight Days after the Forty Weeks it was held legitimate; but in this Caſe there were theſe Circumſtances, (*viz.*) the Husband was ſick but one Day before he died, and and the Wife was expoſed to cold and hard Uſage, by her Father-in-Law, and this occaſioned her Travel for Six Weeks; but as ſoon as ſhe was taken into a (*n*) Houſe, and was ſupplied with Neceſſaries, ſhe was delivered in Twenty Four Hours.

The Civil Law agrees with ours in this Matter, for if a Woman is delivered in the beginning of the Eleventh Month 'tis held to be legitimate, but if born at the end of it 'tis otherwiſe: And we have an Account of a Widdow at *Paris* that was delivered of a Child Fourteen Months after the Death of her Husband, and becauſe of the Reputation of the Woman the Child was held legitimate, tho' it ſeems to be not only againſt Law, but againſt the Order of Nature.

(2.) As for ſuppoſitious Births, both the Laws of *England*, and the Civil Law, provide againſt this.

The Author of *Fleta*, who lived in the Reign of *Ed.* 2. hath a whole Chapter *de partu ſuppoſito*, where he tells us what Remedy the right Heir had in ſuch caſe (*viz.*) that a Writ was directed to the Sheriff to cauſe the Woman, who pretended her ſelf with Child, forthwith to appear in the County Court, there to be ſearched *per diſcretas & legales mulieres*; and if it was doubtful to them whether ſhe was with Child or not, then the Sheriff might commit her to ſome

(*m*) 8 Rep. 101. 1 Inſt. 284. (*n*) 1 Rol. Abr. 356. 2 Cro. 541.

Caſtle,

Caſtle, there to continue, and that no Woman with Child come near her, *quouſq; de partu ſuo conſtare poſſit.*

This Writ was uſed above Sixty Years before *Fleta* wrote, viz. *Anno* 5 *H.* 3. when the Widdow of *William Conſtable* of *Manton* in *Norfolk* was found guilty of this Cheat.

And in all Probability it was of uſe in the *Saxon* Times; for the Form of the Writ is to command the Sheriff to ſummon the Woman to appear *in pleno Comitatu tuo*, as 'tis generally known, that all Buſineſs of the Law was then tranſacted in that Court where the Biſhop ſate with the civil Magiſtrate.

But afterwards, when the Courts at *Weſtminſter* came to be eſtabliſhed, then was the Writ *de ventre inſpiciendo* framed, by which the Sheriff was commanded, that in the Preſence of Twelve Knights, and ſo many Women, *Tractari faciat per ubera & ventrem*, whether the Woman was with Child or not; and if with Child, then about what time it wou'd be born, and that he certifie the ſame to the Juſtices of Aſſize, or at *Weſtminſter* under his Seal, and under the Seals of two of the Men then preſent.

We have two Inſtances of this (*o*) Writ in our Books, one of a Widdow, the other of a Woman who married within a Week after the Death of her Husband; the Writs in both Caſes were iſſued out of *Chancery*, directed to the Sheriff of *London*, who certified that both were with Child; and thereupon two other Writs iſſued out of the Common Pleas, directed to the Sheriff to keep them ſafe in his Cuſtody, and to be viewed every Day by certain Women named in thoſe Writs; ſo that ſome of them might be preſent at her Delivery, which was done in the Caſe of the Widdow, but not in the Caſe of the married Woman, becauſe ſhe was to cohabit with her Husband, and therefore the Court took his Recognizance, that ſhe ſhould not be removed from his Houſe, but be viewed every Day by two Women; and that thoſe, or more, ſhould be preſent at her Delivery.

The Civil Law is as careful in this matter; for the Woman, who ſuppoſes her ſelf to be with Child, muſt intimate it twice in every Month to thoſe who are neareſt concerned, that they may ſend Five Women to inſpect her, and ſhe muſt do the like for the ſpace of a Month, before ſhe expects to be delivered, that they may ſend ſome Perſon to be there at that time.

(*o*) Cro. Eliz. 566, 2 Cro. 686.

The

The Judge may appoint in what Houſe ſhe ſhall dwell, and the Room wherein ſhe lies muſt be ſearched; and if there is more than one Door it muſt be nail'd up; and that three Men, and as many Women, be ſet to watch her as often as ſhe comes into the Chamber, who are alſo to ſearch all Perſons who come into the Houſe and Chamber.

When ſhe is in Labour Five Women ſent by the Party next concerned, muſt be Witneſſes to the Birth, of which they muſt have Notice before-hand; and there muſt be no more in the Chamber, at that time, but Ten Women Two Midwives, and Six Servants, of which none muſt be with Child, and therefore may be ſearched before they go in; there muſt be Three Lights in the Room; the Child, when born, muſt be ſhewed to thoſe who are concerned; the Judge muſt appoint who ſhall keep it, unleſs the Father hath otherwiſe appointed; and it muſt be ſhewed twice in a Month till 'tis Three Months old, and afterwards, once in a Month, till 'tis Six Months old, and once in Two Months till 'tis a Year old; and from thence, once in Six Months, till it can ſpeak; and if any thing is done, or not ſuffered to be done, contrary to the Premiſes, then, upon Proof thereof, the Child is not to be admitted to the Poſſeſſion of the Eſtate.

Benefice.

THIS is a ſendal Term, and according to the general Acceptation of the Word all Church Preferments, except Biſhopricks are comprehended by it; that is, all parochial Preferments, ſuch as *Rectories and Vicaridges*, and likewiſe all Dignities, ſuch as *Archdeaconries*, *Deanries* and *Prebends*.

The Firſt of theſe (*viz.*) *Rectories and Vicaridges* are *Benefices* with *Cure of Souls*, becauſe the Perſons come in by (*p*) Inſtitution and Induction, but not the other; and yet my (*q*) *Lord Coke* tells us, that they had been Benefices with Cure, *&c.* within the Meaning of the Act againſt Pluralities, had it not been for a Proviſee in the Act it ſelf to exempt them, and ſo had *Chancellors*, *Chanters*, *Treaſurers*, in any Cathedral or Collegiate Church, and a Parſonage that hath a Vicar endowed, and a Benefice perpetually appropriate, all which are exempted in that Act.

(*p*) Sid. 426. (*q*) 21 H. 8. cap. 13. 3 Inſt. 71. 155.

But

But ſome are of Opinion that *Archdeaconries*, *Deanries* and *Prebends* had not been *Benefices with Cure of Souls* within the Meaning of that Act, if they had not been *exempted*; for there is no ſuch Clauſe of Exemption in the Statute 13 *Eliz. cap.* 12. concerning reading the Articles of Religion; and yet if an *Archdeacon*, *Dean or Prebend* do not read them within the Time limited by Law, their Promotions are not void; and the Reaſon is, becauſe theſe are not *Benefices with Cure*; and 'tis for this Reaſon that the Canoniſts call ſuch Preferments *ſimple Benefices*, becauſe thoſe who enjoy them have no *Cure*, &c.

As to parochial Benefices with *Cure*, the Canon Law defines them to be a diſtinct Portion of Eccleſiaſtical Rights, ſet a-part from any temporal Intereſt, and joined to the ſpiritual Function, and to theſe, no Juriſdiction is annexed; but 'tis otherwiſe as to *Archdeacons and Deans*, for they have a Juriſdiction, becauſe they formerly took the Confeſſion of the *Chapter*, and viſited them.

'Tis eſſential to theſe parochial Benefices that they ſhould be beſtowed freely reſerving nothing to the Patron;

That it be given freely as a Proviſion for the Clerk, who is only an *uſu fructuary*, and hath no Inheritance in it.

That it muſt always have ſomething of Spirituality annexed to it, for where 'tis given to a Layman 'tis not properly a *Benefice*.

That in its own Nature it ſhould be perpetual, that is for ever annexed to the Church, and that all manner of Contracts concerning it are to be void.

Births.

BY the Statute 6 & 7 *Will. cap.* 3. all Miniſters are to keep Regiſters of the Birth of Perſons born or baptized in their Pariſhes, which Regiſters the Collectors of the Taxes may view at ſeaſonable times, the Clergyman offending againſt the Law forfeits one hundred Pounds.

And by a Statute 7 & 8 *Willi. cap.* 35. made the very next Year, every Incumbent or Curate muſt regiſter the Births of Perſons born in their Pariſhes, and not baptized in the Church, for which he is to take Sixpence to enter it; and if he neglects he forfeits forty Shillings, but then the Parents of ſuch Child muſt give the Miniſter Notice of the Birth or they forfeit forty Shillings.

Biſhops.

THAT Form of Government in the Church, which is now eſtabliſhed here, hath been preſerved in ſome of the *Eaſtern* and *Weſtern* Churches, in a continued Succeſſion of *Biſhops*, from the Apoſtles to this preſent time, and was ordained by our Saviour himſelf, to be a perpetual and unalterable Inſtitution to be obſerved in the Chriſtian Church; for he gave his Apoſtles Commiſſion to plant Churches, which they did, and appointed *Biſhops* to govern them; and this might formerly have been proved by the Records of thoſe very Churches which were founded by them; as that of *Antioch*, *Jeruſalem*, *Rome*, *Smyrna*; for 'tis more than probable that thoſe very Records were extant in *Tertullian*'s Time, otherwiſe, how could he and many other ancient Writers aſſert, that *Clemens*, who was the third *Biſhop* of *Rome*, from St. *Peter*, was ordained by that very Apoſtle?

If this had not been certainly true, and eaſie to be proved at that time, but invented by him, how came he to challenge all the *Hereticks* of that Age to ſhew the like Original of any of their Churches? which they could never do, and yet they wanted neither Skill or Malice to detect him if it had been falſe.

St. *Chryſoſtome*, *Epiphanius*, and many other of the Fathers tell us, that St. *Paul* ordained *Timothy* Bp. of *Epheſus*, and *Titus* *Biſhop* of *Crete*, who were ſuperior to *Presbyters* both in Order and Juriſdiction.

This appeared by (*r*) *Ignatius* who was *Biſhop* of *Antioch*, and died within ten Years after the Apoſtle St. *John*; for he writes in ſeveral of his Epiſtles concerning *Biſhops*, *Presbyter* and *Deacons*, as diſtinct Orders and Degrees of Men, and in ſuch plain and expreſs Terms, that thoſe who are Enemies to Epiſcopacy cannot find any means to evade it, but by affirming thoſe Epiſtles to be ſpurious, and for no other Reaſon but becauſe they would have them ſo.

I grant that the Word *Presbyter* is ſometimes applied to ſignifie a *Biſhop*; but certainly a Biſhop and a Presbyter were never the ſame in Order or Office, for *Timothy* was a *Biſhop*, and the Apoſtle bids him not rebuke an *Elder*, but intreat as a Father: Now there had been no Occaſion of this Admonition, if *Timothy* had not been ſuperior to an *Elder*, and

(*r*) Epiſt. ad Smyr. No. 8. 12.

had not a Juriſdiction over him; and we never read that *Presbyters* rebuked *Biſhops*, which ſhews they were always eſteemed an inferior Order of Men; ſo that when the Word was promiſcuouſly uſed to ſignified a *Biſhop* as well as an *Elder*, it was in thoſe primitive Times when the *Biſhops* were diſtinguiſhed from them by a ſuperior Title, as when they were called *Apoſtles*, or Succeſſors of the Apoſtles, Chief Prieſts, and Princes of the Clergy.

This alſo appears by the difference there is between their Offices and Degrees, for the Power of *Ordination*, of reconciling Penitents, of conſecrating and viſiting Churches, of Excommunication, *&c.* was never truſted in the Hands of meer *Presbyters*; and thoſe Offices, which they might perform in common with the Biſhop as Baptizing, adminiſtring Sacraments, were performed under different Powers, for the Biſhop did it by an abſolute Power, the other by a Power derived from him.

'Tis a weak Objection to affirm that we have no Authority for Epiſcopacy in the *New Teſtament*; for admitting there is none, it may be for this Reaſon, becauſe there was a Hierarchy in the *Moſaical* Diſpenſation, which was not deſtroyed, but but rather ratified by the coming of our Saviour: but 'tis certain that he ſpeaks nothing againſt it, which is a tacite Approbation that it ſhould be continued in the Chriſtian Church, and therefore it might not be neceſſary to mention it expreſly in the Goſpel, becauſe it was ſettled amongſt the *Jews*; and if it had not been approved by our Saviour, 'tis reaſonable to imagine that he would have oppoſed ſuch an Eſtabliſhment in his Church.

But the Goſpel it ſelf gives a clear and plain Diſtinction of the Degrees in the Evangelical Miniſtry; for our Saviour being willing to provide for the building of his Church, when he aſcended on High, he appointed (ſ) *Apoſtles, Prophets, Evangeliſts, Teachers and Preachers for the perfecting the Saints for the Work of the Miniſtry.*

'Tis true, in that elaborate Collection of *Blondell*, we are told that about the latter End of the ſecond Century there was a Church formed without Biſhops, which was governed by *Monks* and *Presbyters* for ſeveral Ages; and this was in *Scotland*; they were called *Culdees*: and this was before the coming of *Palladius*, who was the firſt Biſhop that converted the *Scots* in *Ireland*.

(ſ) Epheſ. iv. 11, 12.

But this muſt be an invention of ſome Monk many Ages afterwards, for there is no Writer mentions theſe *Culdees* for above Five hundred Years after the time of *Palladius*.

Theſe *North Picts* were Converted from *Heatheniſme* (and not from the Hereſie of *Pelagius*, as ſome will have it) by *Columba* a *Scot*, who came from *Ireland* about the middle of the 5th Century, and founded a Monaſtery in the *Iſland* of *Hy* as *Adamnanus* tells us, who was his Succeſſor in that Monaſtery, and wrote his Life.

'Tis true, he was no more than an Abbot, but we are told in the *Saxon* Chronicle that all the *Biſhops* of *Scotland* ought to be ſubject to him, which muſt be in point of Jurisdiction, and not of Order, for *Adamnanus* himſelf acknowledges the Epiſcopal Order to be Superior; and (*t*) Biſhop *Uſher* tells us out of the Annals of *Ulſter* that there was a *Biſhop* always near this Monaſtry, and that the Monks ſent one from thence when King *Oſwald* became a Chriſtian, and this was to Convert the Men of *Northumberland*.

And theſe were really *Biſhops* and not *Presbyters*, for they formed Churches, Ordained *Biſhops* and *Prieſts*; they had a Jurisdiction over the inferior Clergy; they Excommunicated Offenders, and Commanded Obedience to their Cenſures.

But certainly *Blondell* was miſtaken in affirming that there was a Church governed by Monks without *Biſhops*, for there were no Monks in that Age, beſides, Monkery was never in any Nation but where Government was by *Biſhops*, for the Monaſtries where the Monks reſided, were the Schools and Univerſities at that time where Young-men were Educated and made capable of Holy Orders, and from thence were Elected to be *Biſhops*.

This Story related by him is generally thought to be a whimſical invention of *John* of *Fordon*, who lived in the 11th Century; for none of the Old Scotch Writers mention *Culdees* any where but at St. *Andrews*, and not there till it was an Epiſcopal See.

They were called in the Old Scotch *Kildees*, that is, Men of the Bell-Houſe, for they were the Dean and Chapter of the See, till in a conteſt about the Election of a Biſhop they loſt their Places, and were ſupplanted by the *Cannons regular*.

The ſame Author likewiſe tells us, That *Palladius* was the firſt who eſtabliſhed Epiſcopacy in *Scotland*, and this was about the middle of the Fourth Century; but he produces no

(t) Uſher de prim. fo. 701.

Author

Author to prove it who lived near that time, neither indeed could he, for it was a dark and ignorant Age, and the People had no Letters but what they had from the *Greeks* and *Romans*, and took little care to deliver to their Children in Writing what they had received by Tradition.

But long before that time, about the beginning of the Third Century, we have an accompt that there were Three Engliſh Biſhops at the Council of *Arles*, (viz.) thoſe of *London*, *York* and *Carleon*; and that in the firſt *Nicene* Council, which was held about Twelve Years afterwards, there was a Canon made which mentions both Biſhops, Prieſts and Deacons, and that the Biſhop had the ſole power of Ordination and Juriſdiction; and the Canons made at that Council were received here as well as the Creed.

Sulpitius Severus likewiſe tells us, That ſeveral of our Biſhops were preſent at the Council *Ariminum*, and that their Biſhopricks were ſo mean that they lived there at the charge of the Publick.

Gildas, who lived ſoon after the Roman Empire was ſubverted, and about 100 Years after the Saxons came hither, writes, That they being Heathens killed the Governors of the Church, by which he muſt mean Biſhops, becauſe he takes notice that thoſe *Britains* who had eſcaped their Cruelties had Biſhops amongſt them.

Bede, who lived about 100 Years afterwards, gives an account that Pope *Gregory*, who ſent his Miſſionaries hither, committed the care of *Britain* to St. *Auſtin* the Monk, who, when he came, treated with thoſe Biſhops about the Supremacy; and the reſult was, that they would not have him be their *Archbiſhop*.

From what has been ſaid it appears that there were Biſhops very early both in *Scotland* and here; that the *Culdees* were unknown to thoſe Ancient Writers, and likewiſe to *Nennius*, who lived many Years after them.

Tis true, *Giraldus Cambrenſis* lived about 100 Years before thoſe *Culdees* were ſupplanted by the Canons regular, but he did not well underſtand their Original, and therefore he found out a Latin derivation for the Word, and called them *Colidei*; but we have no Author who aſſerts that they governed the affairs of the Church, or that they were Monks, except *Hector Boethius*, who has formed a Hiſtory out of the inventions of *Veremond*, *Archdeacon* of St. *Andrew*'s, and the Monk of *Fordon*.

But as to us here in *England* we have a full and plain Account from our Eccleſiaſtical Hiſtories, that the firſt Converſion of this Nation to Chriſtianity was by Biſhops, who were ſent hither from ſeveral parts to Convert the Saxons.

Thus St. *Auguſtine* was made a Biſhop by *Eleutherius* Archbiſhop of *Arles*, by the appointment of Pope *Gregory*, who gave him power over all the *Britiſh* Biſhops; and he ſettled his See at *Canterbury*, by the leave of *Ethelbert*, in the year 597. who was the King of *Kent*, and under him the Kingdom was brought to Chriſtianity.

About Seven Years afterwards the Kingdom of *Eſſex* was Converted by *Mellitus*, Biſhop of *London*; and Twenty two Years afterwards *Northumberland* was likewiſe Converted by *Paulinus*, firſt Archbiſhop of *York*.

Within the ſpace of Six Years afterwards the Kingdom of the *Eaſt Angles* was Converted by the ſame *Mellitus*; and Three Years after that the *Weſt Saxons*, by *Birinus* of *Burgundy*, who was firſt *Biſhop* of *Dorcheſter*.

About Eighteen Years afterwards the Kingdom of the *Mercians* was Converted by *Finan*, *Biſhop* of *Lindisfarne*, which is an Iſland in the *North*, where that See continued till removed to *Durham*.

The Men of *Suſſex* and *Surrey*, about 26 Years afterwards, were the laſt of this Nation who were Converted; for thoſe Countries by reaſon of the Woods and Rocks were almoſt inacceſſible to Strangers; but *Wilfred*, who was then *Biſhop* of the aforeſaid See of *Lindisfarne*, being expelled his *Biſhoprick*, appealed to *Rome*, and at his return hither was by the power of *Egfrid* King of the *Northumbrians* driven from place to place till he came into *Suſſex*, where he was kindly received by *Edelwalch* King of that place, who gave him *Selſea* near *Chicheſter*, where he built a Monaſtery, which was afterwards made the Seat of the *Biſhop* of that Dioceſs till removed to *Chicheſter*.

And thus in progreſs of about 86 Years this whole Nation gradually received the Truth by the means of *Biſhops*, and thoſe whom they ſent; ſo that the Original Conſtitution of the Engliſh Church may be truly ſaid to be founded in Epiſcopacy.

The *Biſhops*, who were ſo inſtrumental in Converting the *Saxons* as aforeſaid, had each their Dioceſſes as large as the Diviſion of the Seven Kingdoms, except in *Kent*, where the *Archbiſhop* had a Suffragan, who was the *Biſhop* of *Rocheſter*; but every other *Biſhop* was Univerſal, incumbent on each Kingdom, and lived in Common with the Clergy, whom they

they ſent to Preach in ſeveral Parts; but after the Nation became Chriſtian, thoſe itinerant Clergy were laid aſide, and a more convenient Miniſtry was ſettled by degrees in particular Diſtricts and Pariſhes, where the People might certainly reſort to the Publick Worſhip.

After the Kingdoms were entirely United, and as the number of Chriſtians encreaſed, ſo did the *Biſhops* too, and in Conformity to the Civil Government they were alſo United under one Metropolitan, which continues to this day.

Having ſaid thus much of *Biſhops* in general, I ſhall in the next place treat of theſe Matters diſtinctly;

(1.) The Age of Biſhops, and the Way of making them.
(2.) Their Privileges here.
(3.) Their Peerage.
(4.) Whether they are the Third Eſtate of the Kingdom.
(5.) Their Juriſdiction over the Clergy.
(6.) Their Juriſdiction in Caſes of Blood.
(7.) And *laſtly*, what Leaſes made by them are good, and what not.

(1.) By the Canon he is required to be *Thirty Years* of Age; 'tis true, there is no ſuch Rule in Scripture, and this Canon hath often been diſpenſed withal.

Then as to the way of making Biſhops, I find that in the Primitive Times, when a Biſhoprick was vacant, the Biſhop of that Country choſe and ordained another to the vacant See, and the People had no Share in the Choice.

But when the Churchmen became poor, and lived, for the moſt part, by the Charity of the People, it was thought convenient that they ſhould be conſidered in the Election of their Biſhops, and both the Laity and Clergy concurred in nominating him; and there might likewiſe be another Reaſon for it, becauſe he who was to inſpect all, might come in by a general Conſent.

Thus we read when Cities were converted to *Chriſtianity*, the Biſhops were elected *Per clerum & populum*, but as the Number of *Chriſtians* increaſed this was found to be very inconvenient, for (*a*) Tumults were raiſed, and ſometimes Murders committed at ſuch popular Elections, and particularly at one time no leſs than three Hundred Perſons were kill'd at ſuch an Election.

To prevent the like Diſorders, the Emperors being then *Chriſtians*, reſerved the Election of Biſhops to themſelves; but in ſome Meaſure conformable to the old Way, that is,

(*a*) 2 Roll. Rep. 102.

when a Biſhop died, the Chapter ſent *a Ring and a Paſtoral Staff* to the Emperor, which he delivered to the Perſon whom he appointed to be Biſhop of the Place.

The Popes who were at the Head of the Church were pleaſed to ſee Churchmen grow rich, but they were not ſatisfied that they ſhould have any Dependance on Princes, and therefore pretended that they took Money for nominating Biſhops, or charged their Revenues with Penſions; and they would not ſuffer them to take Inſtitutions at their Hands, and thereupon the Canons in Cathedrals choſe their Biſhops, which were uſually confirmed at *Rome*.

But Princes ſtill had ſome Power in thoſe Elections; for we read in the *Saxon* Times all Eccleſiaſtical Dignities were conferred in Parliament; this appears by *Ingulphus*, who was Abbot of *Crowland* in the Reign of *William* the Conqueror, who tells us that *a multis annis retroactis nulla erat canonica prælatorum Electio*, becauſe they were donative by the Delivery of the *Ring and Paſtoral Staff* aforeſaid; the one ſignifying that the (*b*) Biſhop was wedded to the Church, and the other was an Enſign of Honour always carried before him, and was a Token of that Support which they ought to contribute to the Government, or rather that he was now become a Shepherd of the Flock of *Chriſt*. *Hildebrand*, who was Pope in the Reign of the Conqueror, was the Firſt who oppoſed this way of making Biſhops here, and for that purpoſe he called a Counil of One Hundred and Ten Biſhops, and excommunicated the Emperor, *H.* 4. and all Prelates who received Inveſtiture at his Hands, or by any Layman, *per traditionem annuli & baculi*.

But notwithſtanding that Excommunication, *Lanfrank* was made Archbiſhop of *Canterbury* at the ſame time, and by the ſame means as *Malmsbury* tells us; but the *Saxon* Annals in *Bennet-College* Library are, that he was choſen by the Senior Monks of that Church, together with the Clergy and Laity of *England* in the King's great Council.

But be it how it will, *Anſelme* did not ſcruple to accept the Biſhoprick by the Delivery of the *Ring and Paſtoral Staff* at the Hands of *William Rufus*, tho' never choſen by the Monks of *Canterbury*; and this was the Man who afterwards conteſted this Matter with *H.* 1. in a moſt extraordinary manner; for that King being forbidden by the Pope to diſpoſe of Biſhopricks as his Predeceſſors had done by the Delivery

(*b*) Co Litt. 344. a.

of

of the *Ring and Staff*, and he not regarding that Prohibition, but inſiſting on his Prerogative, the Archbiſhop refuſed to conſecrate thoſe Biſhops whom the King had appointed; at which he was ſo much incenſed, that he commanded the Archbiſhop to obey the ancient Cuſtoms of the Kings his Predeceſſors, or to quit the Kingdom.

The Conteſt grew ſo high, that the Pope interpoſed and ſent two Biſhops to acquaint the King, that he would connive at this Matter ſo long as he acted the Part of a good Prince in other Offices.

Thereupon the King commanded the Archbiſhop to do Homage, and to conſecrate thoſe Biſhops whom he had made; but this being only a feigned Meſſage, and the Archbiſhop having a Letter to the contrary, refuſed to obey the King.

At laſt, after ſeveral Heats, the King yielded the Point, reſerving only the Ceremony of Homage of the Biſhops in reſpect of their Temporalities, to which *Anſelme* conſented, ſo as it was done before their Conſecration; and then the Archbiſhop conſecrated thoſe Biſhops whom the King had appointed, and promiſed that no Perſon elected to be a Prelate ſhould be refuſed Conſecration, becauſe of the Homage he had done to the King.

But yet that very King reaſſumed his ancient Prerogative, and inveſted the very next Archbiſhop, who ſucceeded *Anſelme*, with a *Ring and a Paſtoral Staff*, tho he did not long enjoy it; for when the Emperor quitted it he did ſo once more.

Now to add more Solemnity to this Matter, and that Canonical Elections of Biſhops might not ſeem uſurpations on the King's Prerogatives, in appointing whom he pleaſed to vacant Sees; King (*c*) *John*, by his Charter *De communi conſenſu Baronum*, granted that (*d*) Biſhops ſhould be canonically *elected*, ſo that Leave was firſt asked of him, and his Aſſent required after ſuch Election, and ſo that he might have the Temporalties during any Vacancy.

So then they were choſen by the *Dean* and *Chapter*, or the *Priors* and *Convents*; but yet the King retained this ancient Prerogative in recommending the Perſon to them; and that he might influence their Election of that very Perſon, he uſually ſent for the *Dean* and *Chapter*, or ſome of their Number commiſſioned by the reſt who met in his *Chappel*, or in

(*c*) Palmer 25. (*d*) 1 Inſt. 134. 344.

ſome

ſome *Church* near it, and theſe choſe the Perſon he had recommended.

This occaſioned frequent Conteſts between our Kings and Popes, but ſtill the Crown did juſtly claim an Authority over all ſpiritual Things and Perſons; and when Kings were willing to oblige any Pope in this Matter, they would recommend a Perſon to the vacant See, and the Perſon thus recommended, had his Bulls diſpatch'd at *Rome*, and by a particular Warrant from the Pope, was conſecrated and inveſted with the Spiritualties of the See.

And even when the Supremacy of the Pope was moſt exalted here, the Kings of *England* were never totally deveſted of this ancient (*e*) Prerogative; for upon the Vacancy of a *Biſhoprick* there iſſued a Writ out of the *Chancery*, to ſeize the Temporalties in the King's Hands; and before the new elected Biſhops could be reſtored to them, he was to appear before the King, either in Perſon or by Proxy, and renounce every thing in thoſe Bulls which might be prejudicial to the Crown, or contrary to our Laws; and having taken an Oath of Fealty and Allegiance, there iſſued forth another Writ, reciting that all this was done, and by that Writ the Temporalties were to be reſtored.

In the 25*th* Year of *H.* 8.. *cap.* 26. the Parliament paſſed an Act, that Biſhops ſhould not be any more preſented to the Pope, or ſue out *Bulls* from *Rome*; but that upon the Vacancy of any See the Perſon ſhould be preſented to the Archbiſhop; and likewiſe if an Archbiſhoprick ſhould be vacant, the Succeſſor ſhould be preſented to an Archbiſhop in the Queen's Dominions, or to Four other *Biſhops* whom the King ſhould appoint, that upon ſuch Vacancy the *Dean* and *Chapter* ſhould certifie it to the *Queen* in *Chancery*, and pray that they may proceed to a New Election.

Thereupon the Queen grants a Licenſe to them under the Great Seal, to elect the Perſon, whom by her Letters miſſive She hath appointed; and they are to chooſe no other.

Within Twenty Six Days after the Recept of this Licenſe, they are to proceed to Election, which is done after this manner.

The *Dean* and *Chapter* having made their Election, muſt certifie it under their common Seal to the Queen, and to the Archbiſhop of the Province, and to the Biſhop elected;

(*e*) B. H. R. 1 Pt. 11, 12.

then

then the Queen gives Her Royal Assent, under the Great Seal, directed to the Archbishop, commanding him to confirm and consecrate the Bishop thus elected.

The Archbishop subscribes it thus, (*viz.*) *Fiat Confirmatio*, and grants a Commission to his Vicar-general, to perform all Acts requisite to that purpose.

Thereupon the Vicar-general issues forth a Citation to summon all Persons who oppose this Election to appear, *&c.* which Citation is affixed by an Officer of the Arches, on the Door of *Bow-Church*, and he makes three Proclamations there for the Opposers, *&c.* to appear.

After this the same Officer certifies, what he hath done to the Vicar-general, and no Person appearing, *&c.* at the Time and Place appointed, *&c.* the Proctor for the *Dean* and *Chapter* exhibits the Royal Assent, and the Commission of the Archbishop directed to his Vicar-general, which are both read, and then accepted by him.

Afterwards the Proctor exhibits his Proxy from the *Dean* and *Chapter*, and presents the new elected Bishop to the Vicar-general, returns the Citation, and desires that Three Proclamations may be made for the Opposers to appear, which being done, and none appearing, he desires that they may proceed to Confirmation *in pœnam contumaciæ*, and this is subscribed by the Vicar-general in a Schedule, and decreed by him accordingly.

Then the Proctor exhibits a summary Petition, setting forth the whole Process of Election, in which 'tis desired, that a certain Time may be assigned to him to prove it, and this is likewise desired by the Vicar-general.

Then he exhibits the Assent of the Queen and Archbishop once more, and that Certificate which he returned to the Vicar-general, and of the affixing the Citation on the Door of *Bow-Church*, and desires a Time may be appointed for the Final Sentence which is also decreed.

Then three Proclamations are again made for the Opposers to appear, but none coming they are pronounced *Contumaces*; and 'tis then decreed to proceed to Sentence, and this is in another Schedule read and subscribed by the Vicar-general.

Then the Bishop Elect takes the Oaths of Supremacy, Canonical Obedience, and against Simony, and then the Dean of the Arches reads and subscribes the Sentence.

The *Dean* and *Chapter* are to certifie this Election in twelve Days after the Delivery of the Letters missive, or they incur a Præmunire.

And

And if they refuſe to elect, then the Queen may nominate the Perſon by Her Letters Patents.

So that to the making a Biſhop theſe things are requiſite, (*viz.*) Election, Confirmation, Conſecration and Inveſtiture, of all which I ſhall treat in their reſpective Places.

Upon Election the Perſon is only a Biſhop *nomine*, and not *in re*, for he hath no Power of Juriſdiction before Conſecration.

In the Time of the *Saxons* all Biſhops and Abbots ſate in State Councils, by reaſon of their Office, as they were Spiritual Perſons, and not upon account of any Tenures; but after the *Conqueſt* the Abbots ſat there by Vertue of their Tenures, and the Biſhops in a double Capacity, as Biſhops, and likewiſe as (*f*) Barons by Tenure; and this appears *Anno* 11 *H.* 2. when Archbiſhop *Beckett* was condemned in Parliament, for there was a Diſpute who ſhould pronounce the Sentence, either a Biſhop or a Temporal Lord; thoſe who would have a Biſhop do it, alleged that they were Eccleſiaſtical Perſons, and that it was one of their own Order who was condemned, and ſo inſiſted that one of them ought to do it; but the Biſhop replied that this was not a Spiritual but a Secular Judgment; and that they did not ſit there *merely* as *Biſhops* but as (*g*) *Barons*; and told the Houſe of Peers *Nos Barones vos Barones pacis hic ſumus.*

And in the very Year before, *viz. Anno* 10 *H.* 2. it was declared by the Conſtitutions of *Clarendon*, that *Biſhops*, and all other Perſons who hold of the King *in Capite*, have their Poſſeſſions of him *ſicut Baroniam, & ſicut cæteri Barones debent intereſſe judiciis Curiæ Regis*, &c.

And they ought to ſit there likewiſe as Biſhops, that is not as mere Spiritual Perſons, veſted with a Power only to ordain and confirm, *&c.* but as they are the (*h*) Governours of the Church; and 'tis for this reaſon that in the Vacancy of a *Biſhoprick* the Guardian of the Spiritualties is ſummoned to the Parliament in the Room of the Biſhop; and the five New Biſhops of *Briſtol*, *Cheſter*, *Gloceſter*, *Oxford* and *Peterborough*, which were made by *H.* 8. have no Baronies, and yet they ſit there as Biſhops of thoſe Sees by the King's Writ.

His Peerage.] A Biſhop being thus made, I ſhall in the next place conſider him as a Peer of the Realm.

The chiefeſt Objection againſt his Peerage is this, (*viz.*) By the Common Law all Trials in capital Cauſes ought to be *per pares*; now if a Biſhop ſhould be tried for a capital

(*f*) Atterb. 367. (*g*) Seld. tit. Hon. 709. (*h*) Seld. tit. Hon. 96.

Of

Offence, it muſt be by a Jury of Commoners, and therefore they ſay he is a Commoner and no Peer.

In anſwer to this I take it to be a very weak Argument, that becauſe Biſhops have been tried by Commoners out of Parliament, therefore they have no Right of Peerage in Parliament; for the Difference between them and the Temporal Lords, in reſpect of their Trials, may be thus (*viz.*) the Temporal Lords are Peers by Deſcent, but the Biſhops are Peers by Tenure; they have not their Peerage by Inheritance, as the Temporal Lords have, but ſtill they are Peers in Parliament, and have a Right to ſit and Vote there as *Biſhops* and *Barons*, and therefore the different Titles which they have to their Peerage, might at firſt occaſion this Difference in their Trials.

Beſides *Biſhops* were not always tried by Commoners; for *Anno* 15 *Ed.* 3. *John Stratford*, Archbiſhop of *Canterbury*, was tried in Parliament, and ſo was Archbiſhop *Arundell*, *Anno* 21 *R.* 2. without any impeachment by the *Commons*.

And here I cannot but take Notice of the Nine Reaſons, which, in the Year 1641, were ſent with a Bill from the Commons to the Lords, againſt the Voting of Biſhops in Parliament; and the rather, becauſe I do not find them mentioned by the Noble Hiſtorians who oppoſed the Bill, which afterwards paſſed both Houſes.

(1.) The firſt was becauſe it was a great Hinderance to the Exerceſe of their miniſterial Function: And yet they are allowed in all the Reformed Churches, to attend General Councils, Synods, Convocations, *&c.* which is certainly a greater Hinderance to them than a ſhort Attendance in Parliament.

'Tis not ſuch an Hinderance as the Apoſtles put upon themſelves, without any manner of Neceſſity, for they worked for a Livelihood, becauſe they would not be burthenſom to others.

(2.) The ſecond Reaſon was, becauſe they vow and undertake at their Ordination, when they enter into Holy Orders, they will give themſelves wholly to that Vocation.

But this is a miſtaken Reaſon, for they make no ſuch Vow; 'tis true, the Biſhop exhorts them at that time to give themſelves *wholly* to it in a Moral and not in a Mathematical Senſe, which will admit of no Latitude; for otherwiſe it would be a Fault for them to take any juſt and neceſſary Care to provide for their own Houſhold.

(3.) The third Reaſon was, becauſe they are forbidden by Canons and Councils to meddle in ſecular Affairs.

But

But ſuch Canons and Councils were never received here; for by the Common Law they have an undoubted Right to ſit and vote in Parliament, and 'tis the Queen's Prerogative to ſummon them thither.

(4.) Becauſe the twenty four *Biſhops* have a Dependance upon the *Archbiſhops*, by reaſon of their Canonical Obedience to them.

This is likewiſe a Miſtake, for they have no Dependance on them, nor owe Obedience to them; but in Caſes of Appeal and Viſitation: they are *Pares* in Parliament; and 'tis a known Rule, that *Par in parem non habet imperium.*

(5.) Becauſe Biſhops have only Eſtates for their Lives, and therefore are not fit to have a Legiſlative Power over the Honours, Inheritances, Perſons and Liberties of others.

If this ſhould paſs for a Reaſon, it might likewiſe be extended to the Knights, Citizens and Burgeſſes, who are choſen for one Parliament only, and do not ſit there during their Lives.

Beſides the Biſhops are not for their Lives only, but for their Succeſſors alſo in the Honours and Lands which belong to the Church; and there are Inſtances of Temporal Peers for Life, as the Earl of *Surrey* was, and that for the Life of his Father; and yet this was never objected againſt his Voting there.

(6.) Becauſe of the Dependency and Expectancy which Biſhops have to be tranſlated to Places of greater Profit.

If this is a Reaſon it doth not reach the Archbiſhops, becauſe they cannot be tranſlated to Places of greater Profit; but it reacheth all Biſhops by falſly ſuppoſing them to Vote in Parliament, not according to their Conſciences, but in hopes of being preferred; and 'tis a baſe and unmannerly Reflection on Princes, that they ſhould be thought to promote Perſons for ſuch Votes.

(7.) Becauſe Biſhops had, at that time, encroach'd on the Conſciences and Properties of the Subject, and that would encourage their Succeſſors to do the like; and that all Complaints againſt ſuch Encroachments would be ineffectual, becauſe the whole Order of Biſhops here would be Judges of ſuch Complaints.

This Reaſon cannot extend to thoſe Biſhops who were not guilty of ſuch Encroachments, and certainly there were ſome of them innocent as to this Charge; but if all had been guilty, a Complaint made againſt them could not be ineffectual in Parliament, for voting as Judges in their own Cauſe, when 'tis generally known that they never vote in

ſuch

ſuch Caſes; but if they ſhould, it would have no Effect, if they are juſtly charged, becauſe they would be out-voted by the Temporal Lords, there being a great Inequality in their Numbers; this appeared very plain throughout the Reigns of *Ed.* 3. *R.* 2. & *H.* 4. when the Biſhops were aſſiſted with double their Number of mitred Abbots and Priors, but could not hinder the making Laws againſt the Encroachments of the Court of *Rome*, much leſs can they now hinder the redreſſing of any ſuppoſed Exorbitances of Eccleſiaſtical Power, when they have no ſuch Aſſiſtance, and by conſequence where there is a greater Inequality of Votes between them and the Temporal Lords.

(8.) Becauſe 'tis the Intereſt of the whole Number of Biſhops to maintain their Juriſdiction, that it was then found grievous to the Three Kingdoms, that *Scotland* had aboliſhed Epiſcopacy, and that Multitudes in *England* and *Ireland* had petitioned againſt it.

And 'tis probable greater Multitudes would have petitioned for it, but this Reaſon ſhews what was principally intended at that time by all the reſt, not againſt the voting of Biſhops in the Houſe, but againſt Epiſcopacy it ſelf, which afterwards, thro' the Iniquity of the times, ſucceeded.

(9.) The laſt Reaſon was becauſe Biſhops are Lords in Parliament, which makes a great Diſtance between them and the reſt of the inferior Clergy, which occaſions Pride in the one, Diſcontent in the other, and Diſquiet in the whole Church.

This is an Argument (if I may call it ſo) deduced from moral Philoſophy, which affords no Demonſtrations; but certainly all are not proud who ſit in Parliament, neither are all diſcontented who are out of it; and 'tis as certain that the wiſeſt of the Clergy are very well ſatisfied, that ſome of their Profeſſion are advanced to thoſe Honours and Places in the Government, wherein they may be capable, upon all Occaſions, of doing good Offices to them, and to this whole Church.

But ſince this Bill did afterwards paſs both Houſes, and had likewiſe the Royal Aſſent, it may not be improper here to give the Reader a ſhort Account of it.

This Bill was the firſt Deſign againſt the Church, and was receiv'd in the Houſe with a viſible Approbation, and many of the popular Peers, at that time, liked it very well, becauſe it was to deprive the Houſe of thoſe Perſons who were moſt in the King's Intereſt; but the moſt plauſible Reaſon was, that they ought not to ſit there, becauſe it was inconſiſtent

ſiſtent with their Eccleſiaſtical Function to intermeddle with Temporal Affairs, and being removed from the Parliament, they might have fewer Diverſions from their Spiritual Charges.

The Bill paſſed the Commons, but being ſent up to the Peers it was not ſo much as committed, but rejected at the ſecond Reading.

This exaſperated the Party which was violent againſt them, inſomuch that ſoon after a Bill was brought into the Houſe to extirpate Biſhops, Deans and Chapters, with all Chancellors, Officials and their Officers, it was read but once and then laid aſide; but not long after it was revived and read a ſecond Time, and committed to a Committee of the whole Houſe, but it was drop'd; for the leading Men, in each Houſe, were not yet determined to change the whole Frame and Conſtitution of the Kingdom, whatever Malice they might have againſt ſome particular Men of that Order.

However the firſt Bill againſt their voting in the Houſe of Peers, and for diſabling them to exerciſe any Temporal Office, being rejected as above-mentioned, was contrary to the Courſe of Parliaments, preſented again in the ſame Seſſions, and paſſed the Houſe of Commons; but it depended a long time in the Houſe of Peers, who plainly ſaw that their Juriſdiction was invaded by this Bill; but the Virulency of the People was encreaſed againſt the Biſhops, occaſioned chiefly by the Sermons, which in moſt Churches were ſo many Invectives againſt the whole Order, inſomuch that both Houſes having, not long before, taken a Proteſtation to defend the true reformed Religion, expreſſed in the Doctrine of the Church of *England*, againſt all Popery and Popiſh Innovators; that is, to defend the publick Doctrine profeſſed in the Church, ſo far as 'tis oppoſite to Popery and Popiſh Innovators; a Sermon was preached at *Weſtminſter*, by the famous Mr. *Burton*, and ſoon after printed under the Title of the *Proteſtation proteſted*; wherein it was impudently aſſerted, that by that Proteſtation all Men were obliged to remove the Biſhops and Common-Prayer out of the Church; ſo that by the one he muſt mean Papiſts, and by the other Popiſh Innovation.

And what was more ridiculous, a Petition was publiſh'd in the Name of the *London Apprentices*, and probably ſome of them had ſerved but a very little while, and this was directed to the King, attributing the Loſs of Trade to the Papiſts and Prelates (which in thoſe Times were uſually coupled together to make them more infamous) that they ſtood

engaged

engaged to defend the King, and the Rights and Liberties of Parliaments againſt Papiſts and Popiſh Innovators, ſuch as *Archbiſhops*, *Biſhops*, and their Dependants appeared to be; then they deſired the King to take Notice, that notwithſtanding the Endeavours of the Houſe of Commons to ſubdue Popery and Popiſh Innovators, it was yet ineffectual, neither were the Prelates removed, and therefore they deſired that the Laws might be put in Execution againſt Prieſts and Jeſuits, and that Prelacy might be rooted out, that ſo the Reformation might be carried on, and that Freedom of Trade might paſs more chearfully.

This Petition was printed and ſcattered about the City, which ſo much incenſed the Mobb, that the Clamour in the Streets was, *No Biſhops*, *No Biſhops*, who all withdrew their Attendance from the Houſe.

After this they got a Petition from Perſons of a meaner Degree than Apprentices, from the pooreſt and very Dregs of the People, and this was directed to the Houſe of Commons, wherein thoſe poor Wretches were made to complain of the approaching Stories of their Ruine, chiefly occaſion'd (as they were made to ſay) by the Prevalency of Biſhops, that their Miſeries were inſupportable, and that they could not tell where to get Bread for their Families; ſo that unleſs ſome ſpeedy Remedy was taken, they could not reſt in Quietneſs, but muſt be forced to lay hold on the next Remedy, to remove the Diſturbers of their Peace.

This and ſome other contrived Petitions of the like Nature, occaſioned the paſſing this Bill, which was ſoftened with the Title of, a Bill for taking away all Temporal Juriſdiction from thoſe in Holy Orders, to which the King was preſſed to give his Royal Aſſent by theſe Reaſons.

(1.) The Grievances which his People ſuffered by Biſhops exerciſing Temporal Juriſdiction, and their making a Party in the Houſe of Peers, would by this means be removed.

(2.) An univerſal Satisfaction of all ſorts of Perſons would appear in the happy Conjunction and Unanimity in both Houſes; if Biſhops were abſent.

(3.) The paſſing the Bill would be a Pledge of his Majeſty's Gracious Aſſent to the future Remedies of thoſe Evils which had been preſented to him.

But theſe Reaſons did not ſo much prevail on him as the Importunity of the Queen, tho' thoſe of the greateſt Truſt about him inſiſted, that the paſſing the Bill was the only means to preſerve the Church, becauſe thoſe Perſons who were powerfully combined in this Particular, would be ſo

well satisfied in passing it, that they would no farther Attempt an Alteration; but if they were crossed in this matter, 'tis probable they would endeavour, with all the Malice and Violence imaginable, the utter Extirpation of the whole Order.

Those Arguments, and the Perswasion of the Queen, prevailed on the King against his positive Resolution to give his Assent to the *Bill*.

Whether they are the third Estate.] I shall in the next place consider them, as they make the third Estate of Parliament, and in doing this, I must admit, that if they sit there, by reason of their Baronies only, then they would be included with the Temporal Lords, and both represent but one Estate.

'Tis true, when they sit in a *judicial Capacity* as Members of the House of Peers, then they sit as Temporal Barons, and in that Capacity they Vote; but when they sit in the *Legislative Way*, as in passing *Bills* of Attainder, then they represent a third Estate.

And this appears by what I have mentioned before, (*viz.*) that during the Vacancy, *&c.* Writs have been directed to the *Guardians of the Spiritualties* to attend in Parliament; now those Guardians could not sit there by reason of their Temporalties, for they had none, because those were in the Hands of the King, from which 'tis evident, that Bishops do sit there as Spiritual Persons; for otherwise, why should these Guardians of the Spiritualties be summoned thither in the Vacancy of a See.

But the Writ of summons it self is a farther Proof, that the Interest they have in Parliament is not *per Baroniam only*, for that Writ distinguishes between them and the Temporal Barons; the one being summoned to appear *in fide & dilectione*, the other *in fide & ligeantiâ quibus nobis tenemini*.

'Tis true, *Anno* 50 *Ed.* 3. in the Writs of Summons to Parliament, by the Clause *Præmunientes*, *&c.* the *Bishops* were to summon their Clergy to appear *per procuratores ad consentiendum*, but these Words do not exclude them from being part *de Communi concilio Regni*, they signifie that they were to give their Consent according to the Usage of these Times.

But many Years before that, *viz. Anno* 23 *Ed.* 1. the Clause was *ad tractand. faciend. & ordinandum*; and much about the same time the Writs for chooſing Knights of the Shire were *ad faciend. tunc quod de communi concilio ordinabitur*; and can it be inferred from hence that they have no *Votes* in Parliament?

Anno

Anno 26 *Ed.* 1. it was *ad conſentiendum*, the next Year it was *ad faciend'*, and in the Year after it was *ad conſentiendum & faciend'*, and ſo it continued to the 26*th* of *Ed.* 3. and hath been the general Form ever ſince.

The not rightly diſtinguiſhing between the judicial and legiſlative Capacity of the Biſhops, might occaſion the Judges, (*i*) *Anno* 7 *H.* 8. to affirm, that the King might hold a Parliament without the Spiritual Lords; and their Reaſon was, becauſe the Biſhops ſit in the Houſe of Peers, not as they are Spiritual, but as they are Temporal Barons, which is a Miſtake; for when they ſit in the Legiſlative Way, they ſit by vertue of their Spiritualties, as repreſenting a third Eſtate.

There are ſome who will allow them to be one of the three Eſtates of the *Kingdom*, but not of the *Parliament*; but this is what others call a Diſtinction without a Difference; for an Eſtate of the *Kingdom*, and an Eſtate of the *Parliament* are the ſame thing; for by the Conſtitution of our Government, there is no Eſtate of the Realm, but what either in a perſonable or repreſentative Capacity is an Eſtate of Parliament; this appears by the Parliament, *Roll.* 1 *H.* 4. where we find that *R.* 2. appointed two Proctors to declare his Reſignation of the Crown, *Coram omnibus ſtatibus regni*; now the King could not be one, for he had reſigned, and the Word *omnibus* muſt imply more than two; ſo by conſequence he muſt mean the Lords Spiritual and Temporal and Commons.

But I ſhall not inſiſt upon the old Rolls and Authorities in this Matter, of which there are many more, but ſhall inſtance ſomething nearer our own time, *viz. Anno* 1 *Eliz. cap.* 3. in a *Parliament* then held, the Lords Spiritual and Temporal did declare, that they repreſented the three Orders or Ranks of Men of this Realm; and this was the Opinion of our learned *King James*, (*viz.*) that by the ancient fundamental Laws of his Kingdom of *Scotland*, his Subjects there were divided into three Eſtates, therefore he was of Opinion, that he did not make one of theſe Eſtates there; and if not, he could not think himſelf one here.

This was alſo the Opinion of my (*k*) *Lord Coke*, where he tells us, that the High Court of Parliament conſiſts of the King and the *three Eſtates* of this Realm.

It has been objected, that Laws have been made when the Biſhops have voluntarily abſented, and likewiſe when they

(*i*) Keilw. 184. b. (*k*) 4. Inſt.

have been excluded from Parliaments, which Laws have been received by the Nation, and as valid as when the Biſhops have been conſenting.

I admit, that in Conformity to the Canons, they have withdrawn themſelves in caſes of Blood; they have likewiſe abſented upon other Occaſions, as particularly *Anno* 38 *Ed.* 3. when a Law was made againſt the Proviſions of the Pope, ſo *Anno* 20 *H.* 3. *cap.* 9. it was enacted, that a Child born before the Marriage of its Parents ſhould be a Baſtard; this Act paſſed without the Lords Spiritual, for they would not conſent, becauſe it was expreſly againſt the Laws of the Church, but ſtill they took care to preſerve their Rights by Proxies and Proteſtations, with a *Salvo jure*, when they ſaw it requiſite; 'tis true Laws have been made when they were *excluded* the Houſe; but it doth not follow that it was lawful ſo to do, it rather ſhews the Authority of an angry King, who obtain'd ſuch Laws againſt an undoubted Right, for thus it was;

Boniface the 8*th* made a Conſtitution, that the Clergy ſhould pay no Taxes for their ſpiritual Benefices without Leave from the *Pope*, and this upon pain of Excommunication.

King *Ed.* 1. *Anno* the 24*th* of his Reign, having occaſion for Money to carry on the Wars againſt *Scotland*, called a *Parliament* at St. *Edmundsbury*, which met on the 3*d* of *November*, and the Lay-Members unanimouſly conſented to raiſe Money by a Tax, but the Clergy refuſed to conſent; whereupon the King was very angry, but gave them time to conſider till the 13*th* Day of *January* following, to which Day they were adjourn'd to meet at *London*.

This Day being come the Clergy perſiſted in their Denial; the King (as one of our Hiſtorians tells us) was *mutatus in crudelem*, and forbid the Lawyers to plead their Cauſes, for he did not think them worthy of his Protection, and therefore he ordered the Sheriffs to ſeize all their Goods, which could be found upon their Temporal Eſtates, and to lock the Doors of their Barns, and encouraged his Soldiers to affront them in all Places, ſo that they could not go about any lawful Buſineſs alone, but to ſecure themſelves, were obliged to go in Numbers; and his Anger proceeded ſo far, that *excluſo clero concilium cum ſolis baronibus & populo habuit*.

This hath been produced as a notable Argument, to prove that the Biſhops do not make a third Eſtate, and particularly by Mr. *Bagſhaw*, in his reading in the *Middle-Temple Hall* a little before the Civil Wars, his Queſtion was, whether an

Act

Act of Parliament may legally paſs with the Aſſent of the King and his Temporal Lords and Commons, all the Spiritual Lords being *abſent*, or if preſent, wholly *diſſenting*, and to maintain that it might be inſtanced that it was done in that Parliament, *Anno* 24 *Ed.* 1. And he tells us, that if the Law ſhould be otherwiſe, our Religion would not be confirmed by Parliament, becauſe the Act of Uniformity, *Anno* 1 *Eliz.* paſſed when *all* the Spiritual Lords diſſented; but I believe he was miſtaken in their Number, for the learned (*l*) *Biſhop of Sarum* mentions, that the *Archbiſhop of York*, the *Biſhops of London*, *Worceſter*, *Ely*, *Coventry*, *Cheſter* and *Carliſle*, and the *Abbot of Weſtminſter* only diſſented.

But certainly that Inſtance in the Reign of *Ed.* 1. can never be a good *Preſident*, either againſt the Right of Biſhops ſitting in the Houſe, or for the validity of Laws made without their Conſent; for it was an extravagant Execution of the regal Power againſt the clear and unconteſted Right, and a plain Invaſion of the Liberties of the People, by the Subverſion of the very Conſtitution it ſelf.

But admitting that the Act of Uniformity did paſs without the Conſent of *all* the Spiritual Lords, yet it did not paſs *Excluſo clero*; for when they voluntarily abſent, they always preſerve their Right by Proteſtations; and if they were preſent and *all* diſſented, the Law is ſtill good, becauſe it was carried by the Majority of *Votes*; and this was Biſhop (*m*) *Jewell*'s Opinion in his Apology againſt Dr. *Harding*.

Of their Juriſdiction in Caſes of Blood.] Before I leave them in the Houſe of Peers, it may not be improper to conſider their Juriſdiction *there* in Caſes of Blood.

In the Primitive Times Biſhops attended the Cure of Souls, and intermeddled in no ſecular Affairs, but when they were choſen Arbitrators by contending Parties, and this was to reconcile thoſe Quarrels which might occaſion Chriſtians to go to Law before Infidels,

When the Empire became Chriſtian, thoſe Determinations which Churchmen made on ſuch charitable Accounts, had a Sanction added to them by the Imperial Laws, and particularly by *Conſtantine*, who confirmed all ſuch Deciſions, and afterwards they became of great Authority.

This encouraged them to proceed in many other Matters which did not concern their Spiritual Office, and therefore about one hundred Years after the Reign of *Conſtantine the*

(*l*) B. H. R. 2 Pſ. 194. (*m*) Lib. 6. cap. 2.

Great, they were forbidden by the famous Council of *Chalcedon* to meddle with any ſecular Affairs.

Afterwards, when Churches were endowed with Lands by Emperors and others, the ſlaves often paſſed with the Lands; and their former Maſters having a Power over the Lives of ſuch Slaves, by Conſequence the Churchmen to whom they were given had the like Power, which was ſometimes executed with Rigour; and that being an apparent Diminution of their Patrimony, it was agreed that Men ſhould not proceed capitally againſt their Slaves: and about two hundred Years after the aforeſaid *Council*, it was decreed, in the Eleventh Council of *Toledo*, that Prieſts ſhould not judge in capital Caſes, which *Canon* was received in all the Churches of the *Weſt*.

But when *Charles the Great*, and other Princes in the *Weſt*, and particularly the *Kings of England* gave the Biſhops Lands and Dominions, they obliged them, by vertue of thoſe Donations, to attend in their State-Councils, and likewiſe to do other Services by vertue of their Tenures.

By theſe Services their ancient Tenure in *Libera Eleomoſyna* was altered, and *King William* called the Conqueror, made them take their *Temporalties* in nature of *Baronies*, that is, they were to hold them of him, *in Capite*, by certain Duties; and this was ſuch a Diminution of their Spiritual Empire, that the *Popes* of that Age, to diſcharge the *Biſhops* of ſuch Services, and to make them independent on the King, objected thoſe Canons which had been made in Caſes of Blood, as a juſt Excuſe for their withdrawing in ſuch Caſes; and therefore, if they muſt attend, it ſhould not be when Sentence of *Life or Limb* was to be given.

But Archbiſhop *Cranmer*, who was a Man of Learning, did not take thoſe Canons to be obligatory to him; for being one of the Privy Council to King *Ed. 6.* he ſigned the Warrant for the Execution of *Thomas Seymour*, Lord High Admiral of *England*.

And 'tis very probable theſe Canons were never confirmed by the Papal Authority, either in Synods, or otherwiſe, but being grounded upon a plain Hypocriſie, 'tis certain they were never received here ſince the Reformation.

Now the Reaſon which the Canoniſts give, why Biſhops ſhould not be preſent in Caſes of Blood is, becauſe they contract an Irregularity thereby, *ex defectu lenitatis*, and yet they allow them to judge Hereticks, and to deliver them over to the Civil Power to be executed, and is not this a Judgment in caſe of Blood? And can any Man in his Senſes

ſes think, that 'tis ſalved by the Prayer of the Inquiſitors, when the Heretick is thus delivered to Execution, (*viz.*) they pray that he may not be hurt, either in *Wind or Limb*, when they know he will certainly be executed.

For theſe and other ſuperſtitious Whimſies theſe Canons have not been received ſince the Reformation, but the practice hath been quite otherwiſe, for the Archbiſhop of *Canterbury* was the firſt in Commiſſion at the Trial of *Mary Queen of Scots*; and in the Reign of *King Charles* the Firſt there were Ten Biſhops, with other Peers, appointed to examine the Evidence, upon the Impeachment of the *Earl of Briſtol*; and the noble (*n*) Hiſtorian tells us, it was unreaſonably moved in the Houſe of Peers, in the *Earl of Strafford*'s Caſe, that the Biſhops might have no Vote in paſſing that Act of Attainder, and that *Williams*, who was then *Archbiſhop of York*, without conſulting any of his Brethren, declared his Opinion, that they ought not to be preſent, and offered not only in his own Name, but in the Name of the reſt of the Biſhops to withdraw, by which he betrayed a fundamental Right of the whole Order, to the great Prejudice of the King, and to the deſtroying that Noble Perſon who could not otherwiſe have ſuffered.

Of their Juriſdiction over the Clergy.] I ſhall now proceed to treat of their Juriſdiction over their Clergy,

Presbyters in the Church of God are ſubject to Failing, and becauſe Faction and Schiſms may ariſe *inter pares*, where there is no power, therefore to avoid this Miſchief, there was a Neceſſity of a ſuperior Order of Men to inſpect and govern, to viſit and reform any Diſorders, and thoſe were the Biſhops.

When firſt they were eſtabliſhed here, they were to ſee that Churches might be built in their Dioceſſes, and to take care to fill them with Perſons well qualified for the Miniſtry; and a Clergyman was neither to be admitted to a new Benefice, or to leave an old one, without the Leave and Conſent of his Biſhop.

They had Authority not only from Canons, but from the ancient Eccleſiaſtical Laws, which have not their Force from any Conſtitution of the *Pope* (for many of thoſe Decrees were never received here) but from the Cuſtom and Practice of the Church in all Ages, ever ſince Chriſtianity was eſtabliſhed here.

(*n*) Hiſt. Reb. 1 Vol. 274.

Examination.] By theſe Laws they have power to judge of the Ability of the Clerk preſented to them, for the Biſhop is an (o) Eccleſiaſtical Judge, and not a Miniſter in his examining the Clergy; formerly he had two Months time after the Preſentation, but now, by the (p) Canon, he hath only Twenty eight Days to admit or refuſe the Clerk, which if he neglects, then the Preſentee may have a Remedy againſt him in the Court of *Arches*, or Audience by a Proceſs called *Duplex Querela*; or he may have a *Quare impedit* at Common Law which is more uſual, and then the Biſhop muſt ſhew ſome Reaſon for his Refuſal.

The chief Thing in the Examination is to know, whether the Clerk is capable to diſcharge his paſtoral Office * *Scientiâ & moribus*, if the Biſhop is not ſatisfied in either, and a *Quare impedit* is brought againſt him, he muſt not plead a general Cauſe of Refuſal, but he is to certifie the Particulars; and therefore to ſay generally that the Clerk is *inhabilis*, or *criminoſus*, is not ſufficient, becauſe a Perſon cannot be *criminal* without doing ſome Act which will admit a Trial, either in the Spiritual or Temporal Courts, according to its Nature.

Beſides in affirmative Pleas particular Circumſtances are requiſite to make the Fact clear, but in the negative Pleas 'tis otherwiſe.

I ſhall not enlarge on this matter, becauſe it would be only to repeat what the Reader may find in the Title *Admiſſion*,

But muſt ſay, that when Chriſtianity was firſt eſtabliſhed here, the Biſhops of the reſpective Dioceſſes had the immediate Care of the Churches, and ſent their Clergy, who at firſt lived in common with them, to ſerve the *Cures* in ſuch Places as they thought convenient, but ſtill within their own Dioceſſes; and it was their Care to ſee the Revenues of the Church diſpoſed to proper Uſes; for thoſe who were maintained by thoſe Incomes, always had it *Epiſcopo diſpenſante*; this was expreſly required by the Apoſtolical Canons, and by the Councils of *Antioch* and *Gangra*.

That when thoſe Biſhops ſaw a Neceſſity to fix the Clergy to attend that Service in particular Places; and when Lords of Mannors afterwards built and endowed Churches, and by that means obliged the Clergy to a particular Attendance within certain Limits, which were called Pariſhes; tho' they conſented that ſuch Lords or Patrons ſhould nominate Clerks to thoſe Churches, yet it was ſtill upon Condition

(o) 5 Rep. 57. 2 Inſt. 632. (p) Canon 95. * See Title Preaching.

that

that Biſhops might be ſatisfied in their Qualifications and Abilities to perform the Service, ſo that the Biſhops were always Judges of the Fitneſs of theſe Clerks who were to ſerve the *Cures* in their Dioceſſes, and it was reaſonable it ſhould be ſo, becauſe the Biſhops had the Care of the whole.

'Tis no Objection to ſay that this Power, which is lodged in the Biſhop, may turn to the Prejudice of the Patron's Right, by making his Preſentation ineffectual, if he ſhould not think the Clerk qualified; for 'tis a Truſt repoſed in him by the Law, and cannot be ſo properly placed in any other Perſon, becauſe he hath the Care of the whole Dioceſs as aforeſaid.

'Tis a Truſt allowed by all Chriſtian Nations where the Right of Preſentation is owned; and ſome Canoniſts, and particularly *Rebuffus*, have told us, that 'tis a damning Sin in a Biſhop not to examine the Clerk preſented; and that 'tis his Fault, and not the Patrons, if a Man not qualified ſhould obtain a Benefice.

'Tis true, the Judgment of the Biſhop is not concluſive in this Caſe, but the Party may appeal to the Supreme Eccleſiaſtical Court, and then the Archbiſhop is to judge of his Sufficiency.

However the Biſhop is firſt to examine him, 'tis expreſly required by the (*q*) Canon, which is thus:

The Biſhop, before he admits any Perſon into Holy Orders, ſhall diligently examine him in the preſence of thoſe Miniſters who ſhall aſſiſt him at the Impoſition of Hands; and if the ſaid Biſhop have any lawful Impediment, he ſhall cauſe the ſaid Miniſters carefully to examine every ſuch Perſon ſo to be ordered, provided that they who ſhall aſſiſt the Biſhop in examining and laying on Hands, ſhall be of his Cathedral Church, if they may conveniently be had, or Three other ſufficient Preachers of the ſame Dioceſs; and if any Biſhop or Suffragan ſhall admit any to Sacred Orders, who is not ſo qualified and examined, the Archbiſhop of that Province having Notice thereof, and being aſſiſted therein by one Biſhop, ſhall ſuſpend the ſaid Biſhop or Suffragan ſo offending, from making either Deacons or Prieſts for two Years.

After ſuch Examination, and not before, the Way is open for Admiſſion, Inſtitution and Induction.

(*q*) Can. 35.

'Tis

'Tis probable that this Canon had ſome reſpect to the (r) Statute called *Articuli Cleri*, by which 'tis enacted, That *de idonietate Perſonæ præſentatæ ad beneficium eccleſiaſticum pertinet Examinatio ad judicem eccleſiaſticum, & ita eſt hactenus uſitatum & fiat in futurum.*

So that the Biſhop's Power of Examination, *de idonietate Perſonæ*, was not then a new thing, for that Act was declarative of a Cuſtom heretofore uſed in this Kingdom, by which it appears that the Biſhops Right of examining Clerks was part of the Common Law, as well as of the Canons.

I ſhall only mention ſome other (ſ) Powers and Priviledges they have, becauſe I have treated more largly of them under their reſpective Titles.

They have Power of accepting or refuſing Reſignations of Benefices, of Admiſſions to Benefices preſentative or donative; of Deprivation, of Colluſions by Laps, of Inſtitutions, *&c.*

(2.) They have likewiſe a Power of *Ordination*, and this they have as ſoon as they are conſecrated, but 'tis not local and confined to their reſpective Dioceſſes, but 'tis an inherent Power wherever they are, and therefore the Archbiſhop of *Spalato* might have conferred Orders when he was here.

(3.) They have a Power of Juriſdiction, but not till after Confirmation, and this is limited to their reſpective Dioceſſes only, *viz.* they may excommunicate and puniſh (t) Offenders there, but not elſewhere.

They pay no Reliefs, becauſe they come into their (u) Biſhopricks by Succeſſion, and not as Heirs by Inheritance; they enjoy the ſame Priviledges with other Temporal Barons, for in real Actions they muſt have a Knight returned of the Jury; they have Priviledge of Hunting in the King's Foreſts, and they may maintain an Action *de ſcandalis magnatum.*

I ſhall now mention ſomething concerning Leaſes made by Biſhops.

At Common Law a Biſhop could not make a Leaſe for a longer time than he was Biſhop of that Dioceſs where the Lands were; but a Leaſe made by him, and confirmed by the Chapter, was good for any time whatſoever.

But it was found to be very inconvenient, that a Biſhop ſhould have ſo little power alone over the Eſtate of the Church, and ſo much when he was joined with his Chapter; and there-

(r) Cap. 1. (ſ) Other Powers and Priviledges. (t) Palm. 474.
(u) 2 Inſt. 7.

fore,

fore, by the Statute 32 *H.* 8. *cap.* 28. which is commonly called the Enabling Act, Biſhops had Power to make Leaſes of *Mannors, Lands, Tenements, or Hereditaments* for three Lives, or Twenty One Years, without any ſuch Confirmation by the Chapter.

Sir *Simon Degg* was of Opinion, that, becauſe that Statute did not extend to Leaſes made of the very *Scites and Demeſnes, &c.* therefore about Eighteen Years afterwards, by another Statute, it was enacted, that Leaſes made other than for Twenty One Years, or three Lives ſhould be void.

But there may be another Reaſon aſſigned for the making that Statute, for tho' by the Act 32 *H.* 8. Biſhops alone were enabled to make Leaſes for Twenty One Years without Confirmation by the Chapter; yet that did not take away the Power they both had before; for notwithſtanding that Act the Biſhop and his Chapter might make what Eſtate they pleaſed of the Lands of the Church, but becauſe they ſhould not exceed Twenty One Years, or Three Lives, therefore that Act was made.

The Leaſes to be made by Biſhops, purſuant to the Statute 32 *H.* 8. muſt have theſe Qualifications.

(1.) They muſt commence from the making and not *a die datus.*

(2.) If there is an old Leaſe in being, it muſt be abſolutely ſurrendered without any manner of Condition, or it muſt expire within a Year after the making the new Leaſe.

(3.) There muſt not be a double Leaſe in being at the ſame time, (*viz.*) one for Years, and another for Lives.

(4.) The Leaſe muſt be of *Lands, Tenements, or Hereditaments*, out of which *an Annual Rent* may be reſerved, *&c.*

(5.) It muſt be made of ſuch Lands which have been *uſually* let for the moſt part of Twenty Years before the making the new Leaſe.

(6.) The yearly Rent reſerved, muſt be ſuch as hath been *uſually* paid for Twenty Years next before the making the new Leaſe.

(7.) It muſt not be made without Impeachment of Waſt.

Of all which I ſhall treat diſtinctly.

(1.) And *Firſt*, The Leaſe muſt commence from the making and not *a die datus*, for that excludes the Day on which it was made; ſo if a Leaſe of Lands is made for Twenty One Years, *Habendum a datu indenturæ*, when there were Four Years of a former Leaſe then in Being, 'tis void upon this Statute, but 'tis good upon the Statute 1 *Eliz.* hereafter men-

mentioned, to bind the Succeſſor if confirmed by the Chapter, for this laſt Statute doth not ſay that it ſhall be a Leaſe for Twenty One Years abſolutely, and to commence immediately, but it muſt be for Twenty One Years *from* the time of the Commencement, and this is the Reaſon why concurrent (*x*) Leaſes have been held good.

They diſtinguiſh in Caſes of Tythes between a Leaſe for Years and for Lives; for if made for three Lives, *habendum* from *Michælmas* next after the Date of the ſaid Leaſe, 'tis void, becauſe Tythes cannot paſs by way of (*y*) Reverſion, where an Eſtate for Life is limited, tho' they may by way of Diſcharge or Retainer.

(2.) If there is an Old Leaſe in being, it muſt be abſolutely ſurrendred, or expire within a Year after the making the New Leaſe.

This muſt be underſtood where the Biſhop makes a new Leaſe without confirmation by the Dean and Chapter; but if more then One Year is in being at the time of the making the (*z*) new Leaſe and 'tis confirmed, ſuch Leaſe is good.

(3.) There muſt not be a double Leaſe in being at one and the ſame time; that is a (*a*) Leaſe for Years, and another for Life.

Theſe Leaſes for Lives muſt not be to one for Life, remainder to another for Life, *&c.* but the (*b*) Lives muſt all ware together, for if 'tis otherwiſe the Leaſes are voidable.

Neither can (*c*) Biſhops make Leaſes for 99 Years, determinable upon Three Lives; but a Leaſe to one for Three Lives is good, for 'tis the ſame in effect as a Leaſe to Three for their Lives.

(4.) The Leaſe muſt be made of *Lands*, *Tenements*, or *Hereditaments*, out of which an *Annual Rent* may be received, and not of things which lye in Grant, as Fairs, Markets, Advowſons, Tythes, *&c.* and therefore Biſhop *Jewell* having made a Leaſe of a Fair in *Sherborne*, for Three Lives, rendring the Ancient Rent, which Leaſe was confirmed by the Dean and Chapter, it was held void againſt the Succeſſor, becauſe a Fair is no more then a Franchiſe, out of which a Rent cannot be reſerved.

So where the (*e*) Biſhop of *Carliſle* made a Leaſe of Tythes for Three Lives, this was likewiſe held void againſt the Succeſſor, becauſe he had no remedy either by Diſtreſs or

(*x*) 1 And. 65. (*y*) Sel. 131. (*z*) 4 Leon 78. (*a*) More 253. 5 Rep. 2. (*b*) Cro. Car. 95. 6 Rep. 37. a. (*c*) 8 Rep. 70. b. (*d*) 2 Cro. 76. (*e*) Hardres 326.

an

an Action of Debt for Rent; but if it had been a (*f*) Leaſe for Years of Tythes, it had been otherwiſe, becauſe an Action of Debt may be brought for the Rent, by the Succeſſor, not upon any privity of the Contract, for he is not privy to the Contract of his Predeceſſor, but upon the privity of Eſtate, for he hath the Reverſion; and therefore an Aſſignee of a Term ſhall be charged with the Rent, becauſe it attends the Term.

As to the word *Hereditaments* in this Clauſe, it muſt relate only to ſuch which are parcel of the poſſeſſions of the Biſhoprick thereof; if an (*h*) Archdeacon having a Parſonage appropriated to his Archdeaconry, makes a Leaſe of the Glebe for 50 Years, and the Biſhop being Patron, together with the Dean and Chapter, confirms it, this is not void againſt the Succeſſor, becauſe his confirmation paſſeth no Eſtate; 'tis no more then his aſſent to a Leaſe of parcel of the poſſeſſions of his Archdeaconry, and not of the Biſhoprick.

(5.) The Leaſe muſt be of ſuch Lands which have been uſually Lett for the moſt part of Twenty Years before the making the new Leaſe.

As to this matter, if 20 *Acres* of Land hath been *uſually* Lett, and a (*i*) new Leaſe is made thereof, and of *Two Acres more* which had not been *uſually* Lett, reſerving the uſual Rent yearly, this Leaſe is not warranted by the Statute, becauſe part of the Land was not *uſually* Lett; and tho' more Rent was reſerved for thoſe *Two Acres*, yet that will not make the Leaſe good, becauſe the Rent iſſueth out of the whole.

Anno 21 *Car.* 2. This Caſe happened, *viz.* Lands belonging to the Archbiſhop of *York* were Lett for Three Lives, by Leaſe, Dated *Anno* 1604. and there being one of theſe Lives ſurviving in the year 1630, the Archbiſhop (who was then) purchaſed the Leaſe, and did not Lett the Land for the ſpace of 15 Years; and the Civil Wars coming on, thoſe Lands were Sequeſtred, and no other Leaſe made of them till the year 1663. The Court was divided whether this was a good Leaſe or not; thoſe who held it good, inſiſted that it muſt be ſo, becauſe, otherwiſe any Biſhop might keep Lands in his hands for 15 Years, if he lived ſo long, and then ſuch Lands could never afterwards be Lett:

But thoſe who held the Leaſe void went upon this Reaſon, (*viz.*) That under the pretence of (*k*) Antient Leaſes all

(*f*) Moor 778. 2 Cro. 173. (*g*) Raym 18. 2 Sand. 303. (*h*) Cro. Eliz. 430. (*i*) 1 Inſt. 44. b. (*k*) Sid. 416. 1 Lev. 212.

the

the Lands would be Demiſed, and none left for Hoſpitality, for that was the reaſon why that Clauſe was inſerted in the Statute, (*viz.*) That no Lands ſhould be Lett but what had been Lett for the moſt part of Twenty Years laſt paſt, *&c.* for if it had not been *uſually* Lett for that time, how could any Man know what was the Ancient Rent?

It hath been a Queſtion, whether *Copyhold Lands* are comprehended by the general word (Lands) in this Statute, becauſe they, being Eſtates at will, are not properly Demiſable; but it hath been adjudged ſuch (*l*) Lands are within the Statute.

My Lord *Coke* was of Opinion, that if Lands were in Leaſe for Eleven Years, next before the making the new Leaſe, 'tis ſufficient, and that in ſuch caſe it ſhall be conſtrued that they were *uſually* Lett, but Juſtice *Twiſden* held otherwiſe; for, that the words in the Statute muſt import a more ancient time of being in Leaſe, and (*m*) my Lord Chief Juſtice *Vaughan* agrees with him, that by the words *uſually* Lett, ſuch Lands can never be intended which have been Lett but once; but the words may be taken in two Senſes, the one for the repeated Act of Leaſing, the other for the continuance of the Lands in Leaſe; and therefore Lands Leaſed many Years ſince, tho' but for once, may in propriety of Speech be called Lands uſually Demiſed, that is, they have been in Leaſe, which he tells us is the received ſenſe of thoſe Words.

But what was not in Leaſe Twenty Years before the making the new Leaſe, cannot be ſaid to be Lett for the greateſt part of that time.

So if Lands had been anciently in Leaſe for Lives, and afterwards kept in the hands of a Biſhop for Twenty Years, before the making the new Leaſe, this ſeems to be a good Leaſe to bind the Succeſſor; for the intent of the Law was not to tie (*n*) Biſhops ſtrictly to the words of the Statute, but to preſerve the ancient Rent.

'Tis true, it muſt be once (*o*) Demiſed, otherwiſe it cannot be known what was the ancient Rent.

(6.) The *reddendum* muſt be of ſo much Rent which hath been *uſually* paid for the Land within Twenty Years, as aforeſaid, and made payable to the Leſſor and his Succeſſors.

(*l*) Moor 759. Eliz. 875. (*m*) Vaughan 33, 34. (*n*) Sid. 416. (*o*) Cro.

But

But if in an old Leaſe there is Rent reſerved, and an *Heriot*; and in the new Leaſe the *Heriot* is omitted, the (*p*) Leaſe is good; for an *Heriot* is no more then a *Service*, 'tis not an annual Rent, nor depending upon it.

So, likewiſe, if there hath been ſome variation in former Leaſes, yet if in the (*q*) new Leaſe the ſame Rent is reſerved which was in the laſt, this ſhall be accounted the ancient Rent.

But if in the old Leaſe a certain Rent had been reſerved, and a *couple of Capons*, and the ſame Rent is reſerved in the new Leaſe made to a *Man and his Wife*, and the *Husband covenanted* to pay the *couple of Capons*, this was held by (*r*) my Lord *Hales* to be a void Leaſe, becauſe in the firſt Leaſe the *Capons* were part of the Rent reſerved, but in the laſt there was only a Covenant by the Husband to pay them, which would not bind the Wife if ſhe Survived; and therefore that Covenant would not amount to a Reſervation, which it would have done if both had Covenanted.

Upon the whole matter, 'tis plain, That by this Paragraph there muſt be a certain and determinate Rent expreſſed in the Leaſe; and therefore, when a (*s*) Biſhop made a Leaſe, rendring to him and his Succeſſors the uſual and accuſtomed Rent, and not mentioning how much, for this reaſon the Leaſe was held void.

But if a whole Farm is lett out in parcels, which was uſually lett together, there a full Rent *pro rata* makes the Leaſe good, becauſe the Succeſſor hath no prejudice, and 'tis not neceſſary that the old Rent ſhould be reſerved out of the old Land, for if 'tis reſerved out of leſs Land, the Leaſe is good, for the reaſon abovementioned, that is, the Succeſſor is not impoveriſhed, nor his Reveuue diminiſhed.

And as to the Rent *pro rata*, a Biſhop may have more of it, and better Tenants by parcels then in Groſs: 'Tis true, my Lord Chief Juſtice *Vaughan* held that the old Rent muſt be reſerved out of the old Land, for otherwiſe the Biſhop may demiſe leſs Land at the old Rent, and there may not be ſufficient Diſtreſs to be had on ſuch Land to ſatisfie that Rent.

But 'tis generally agreed, that the old Rent iſſuing out of an old Farm may be apportioned *pro rata*; but if part is lett and part unlet it may be doubted.

(*p*) 6 Rep. 38. 2 Cro. 76. 1 Inſt. 44. b. (*q*) Hardres 326.
(*r*) Hardres 325. (*s*) Cro. Car. 95. (*t*) Hardres 326.

(7.) The

(7.) The Leaſe muſt not be made *without impeachment of Waſte*, and therefore if 'tis made to one for Life, remainder to another for Life, and ſo to a third for the like Eſtate; tho' theſe are three Lives according to the Statute, yet this Leaſe is void againſt the Succeſſor, becauſe the intermediate Eſtate for life makes the Tenant in poſſeſſion diſpuniſhable for Waſte.

But the Biſhops were enabled by the aforeſaid Statute 32 *Hen.* 8. to make Leaſes, *&c.* for Three Lives, or Twenty one Years, *without Confirmation*, yet they were not reſtrained by the Law (as I have before obſerved) from that large and ancient Power which they had before in making long Leaſes, *&c. with Confirmation*; and therefore, (*u*) *Anno* 1 *Eliz.* it was Enacted, *That all Eſtates made by Biſhops of any Lands or* other Hereditaments, *parcel of the poſſeſſions of their Biſhopricks, or United, or appertaining to the ſame, to any Perſon or Perſons, other then for* 21 *Years, or Three Lives, from the time of ſuch Eſtate made; and whereupon the accuſtomed or yearly Rent, or more, ſhall be reſerved, and payable, during ſuch term of Years or Lives, ſhall be void.*

Before I ſhall treat particularly on this (*x*) Statute, I muſt take notice that there is a difference between Leaſes made by a Biſhop *de facto*, and thoſe made by a Biſhop *de jure*; for in the firſt Caſe, tho' ſuch a Leaſe is *Confirmed*, it ſhall not bind the Succeſſor, becauſe 'tis a voluntary Act, which he might have omitted without prejudice; but all Admiſſions and Inſtitutions by a Biſhop *de jure* are good.

This Law was made purely for the benefit of the Succeſſor, and therefore, where a Leaſe is made by a Biſhop, and not prejudicial to his Succeſſor, tho' it wants ſome other circumſtances, it ſhall not be void, as for inſtance, (*y*) a Leaſe made by a Biſhop *habendum a die indenturæ*, rendring the ancient Rent, and confirmed by the Dean and Chapter, tho' there were Four Years of a former Term in being, yet this is not void, becauſe 'tis no injury to the *Succeſſor*; 'tis true, it cannot commence in Intereſt preſently, becauſe the former Leaſe was not expired, but it commences by way of Eſtopple, ſo that the *Succeſſor* will be entituled to Two Rents, one in Intereſt, and the other by Eſtopple.

Such Leaſe is void upon the Statute 32 *Hen.* 8. becauſe there is a former Leaſe in being, but not upon this Statute, becauſe 'tis capable of a Confirmation, and being Confirmed, ſhall bind the *Succeſſor*.

(*u*) 1 Eliz. cap. 19. (*x*) 2 Cro. 552. (*y*) Moor 107.

But

But no confirmation will make a double Leaſe good, that is, where a Leaſe for lives is made before the Leaſe for years expires, becauſe this (z) Statute is in the disjunctive, *viz.* That a Leaſe ſhall not be good other than for Twenty one Years, or Three Lives, which ſhews that both cannot be good at one and the ſame time.

Beſides, the accuſtomed yearly Rent muſt be paid *during the* (a) *term* for Years, or Lives, which cannot be in caſes of ſuch double Leaſes; for if the Leſſees for life ſhould enter, the Succeſſor hath no remedy againſt them for the Rent, either by Diſtreſs or Action of Debt, if the Leaſe for years is not expired, and he cannot have an Aſſize, for he never had any Seiſin, ſo that there is a poſſibility that the Leſſees for life may for ever be diſcharged of the Rent, becauſe they may die before the Leaſe expires; but if they ſurvive, then the Succeſſor hath a remedy for the Arrearages.

In the next place 'tis to be obſerved, that this is a private Act of Parliament, for it concerns Biſhops only; and therefore cannot be given in Evidence, but muſt be Pleaded.

That all Leaſes made by virtue of this Act, muſt have the ſame reſtrictions as required by the Act 32 *Hen.* 8. though there are ſome variations between theſe Statutes; as for Inſtance, the Statute 32 *Hen.* 8. requires, that Biſhops Leaſes ſhould be made of Lands *uſually Lett for the ſpace of Twenty Years laſt paſt*, which Clauſe is left out of the Statute 1 *Eliz.* but there are words which amount to it, *viz.* That the *accuſtomed yearly Rent ſhall be reſerved*, which cannot be if the Lands had not been uſually Lett.

So the Statute 32 *Hen.* 8. requires, that the old Leaſe ſhould expire or be ſurrendred, within One Year from the making the new one, which is not required by (b) 1 *Eliz.* And tho' that Statute Enacts, that all Eſtates made by Biſhops, of any Lands, parcel of their Poſſeſſions, of their Biſhopricks, other than in the manner therein preſcribed, ſhall be void; and doth not enjoyn that the Leaſe ſhall be of Lands *uſually Lett*, or that the old Leaſe ſhould expire, *&c.* yet it muſt be made of ſuch Lands, and the old Leaſe muſt be expired or ſurrendred within a Year, *&c.* otherwiſe the new Leaſe is void againſt the *Succeſſor*, unleſs confirmed by the Dean and Chapter.

So the Statute 32 *Hen.* 8. requires, that the Eſtate ſhould be made of Lands, out of which a Rent may be reſerved; and therefore a grant of the next Avoidance is not good, after the

(z) 1 Mod. 204. (a) 5 Rep. 2, 3. 1 And. 195. Cro. Eliz. 141.
(b) Bridg. 30.

making this Statute, tho' confirmed by the (c) Chapter, becauſe there can be no Rent reſerved out of it, but it is good againſt himſelf; for it was not the intent of the Law to bind the (d) Biſhops in Poſſeſſion, ſo that they could not do any thing to bind themſelves or their Lands, during their own lives; for then they could not Leaſe any Land which had not been uſually Lett, before the making theſe Statutes, but muſt manure ſuch Lands by their own (e) Servants; neither could they have any benefit of Waſtes, but only to take the Herbage with their own Cattel.

Offices] There are ſome *Offices* which may be comprehended under the words in this Statute, and accounted as *parcel of the Poſſeſſions of the Biſhoprick*, or at leaſt as appertaining to the ſame; and tho' the Biſhop cannot exerciſe ſuch *Offices* himſelf, yet he hath an inheritance in the Gift and diſpoſal thereof, and theſe are ſuch which are ancient *Offices*, the grants whereof, with their (f) ancient Fees, *confirmed by the Dean and Chapter* are made good, by the intention and equity of this Statute, tho' not warranted by the expreſs Words.

But tho' ſuch ancient Grants are allowed for neceſſity, yet they ought not to be accompanied with a new Charge, for that would be a diminution of the Revenue, and impoveriſh the *Succeſſor*; and 'tis agreed on all hands that this Statute was made for his benefit.

Therefore where a (g) Biſhop was ſeiſed of a *Park* to which the office of a *Keeper* anciently belonged, which he granted with the uſual Fee, *nec non cum paſtura pro duobus equis in eodem parco*, tho' this was confirmed by the Dean and Chapter, yet the Court were divided whether it was good againſt the *Succeſſor*; they all agreed that it was void as to the Paſture, becauſe it was of a new thing never granted before; but whether that addition made the other part of the Grant void was the Queſtion? upon which they were divided. Some were of Opinion that theſe were diſtinct Grants, and that one ſhould be good, and the other void, againſt the *Succeſſor*.

So where the ancient (h) Fee hath been encreaſed in a new Grant, ſome are of Opinion that the Grant of the Office it ſelf is good, and likewiſe ſo much of the ancient Fee which was granted, but the reſt ſhall be void.

(c) Cro. Eliz. 2. 690. (d) 10 Rep. 60. b. (e) 1 And. 244. Cro. Eliz. 207. 1 Leon 205. Cro. Eliz. 609. 2 Cro. 173.
(f) 10 Rep. 62. (g) Bridg. 29. Cro. Car. 47. Ley 7
(h) 2 Brownl. 237.

Bish

But in all these grants of (*i*) *Fees* it must appear in Pleading, that they are *ancient Fees*, for tho' the *Office* is ancient, yet if the *Fee* is not so too, the grant is void.

And 'tis to be observed, that all these (*k*) Grants are to be made *as usual, before the making this Statute*, therefore a grant of an *Official* by an Archdeacon, or of a Commissary by a Bishop, is void against the *Successor*, if granted in *Reversion* where it was usually granted in Possession, before the Statute; for these Offices are *Hereditaments*, and belong to Bishops and Archdeacons, and so are comprehended by the very words of this (*l*) Statute; and therefore if they were granted in *Reversion* before the Statute, they may be so still, but not without Confirmation.

Some are of opinion that if a Bishop grants the Office of a *Commissary*, 'tis good only during his Life; for tho' an Ecclesiastical Jurisdiction may be executed by a substitute, yet his acts are in Law the acts of him who deputes him, for which he must be answerable, and not the Deputy. So that if such a (*m*) grant should be good against the *Successor*, then he must be liable to the acts of a Person whom he never deputed, which seems very unreasonable.

However, the grant of the Office of a *Register*, for Life in (*n*) *Reversion*, hath been held good, and that 'tis sufficient Evidence to produce but one Grant thereof before the Statute; for that may be an inducement to believe that it was anciently so Granted.

And generally the Grants of such Offices for Life are good, if they are ancient and necessary Offices; for if a Bishop had not power by Law to dispose of such Offices for the Life of the Grantees, he would be ill served by Men whose Titles were so precarious.

But if he should grant such an Office for Life, and afterwards to another in Reversion, such grant is void; and so it is where an Office is granted to two for Life, if not usually so granted before the making this Statute.

Therefore the Bishop of *Salisbury*, *Anno* 11 *Jac.* granted the (*o*) *Stewardship* of his Mannours to Two for Life; and Twenty Nobles Fee issuing out of Lands, parcel of his Bishoprick, to be exercised by them or their Deputies which was confirmed, *&c.* but held void against the *Successor*. For, tho' a Bishop may grant an ancient Office to one, and there

(*i*) Brownl. 182. (*k*) Cro. Car. 258. Jones 263. Winch, Lut. 22. (*l*) 2 Rol. Abr. 154. Jones 311. (*m*) Noy 153. (*n*) Cro. Car. 279. Jones 310. Manch. 38. Cro. Car. 555. 2 Rol. Abr. 153. Winch, Entr. 22. (*o*) 10 Rep. 59.

is a neceſſity that ſuch grant ſhould be good, for the reaſon abovementioned, yet there is no neceſſity that he ſhould make ſuch a grant for Two Lives; but if he ſhould, and one of the Grantees Dies in the life time of the Biſhop, who made the Grant, and then he Dies, ſo that there is but One Life in being againſt the *Succeſſor*, yet the Grant is void againſt him; for it was void when firſt made, and ſhall never be made good by any Contingency.

Upon the whole Matter, as a Biſhop may grant an ancient (*p*) *Office*, with the uſual Fee, ſo he may grant a new *Office* which is of neceſſity for him to Grant, and with a reaſonable Fee, and ſuch Grants ſhall be good againſt the *Succeſſor*, if confirmed by the Dean and Chapter. And therefore, in the very ſame Year in which this Statute was made, the Biſhop of *Ely* granted the Office of *keeping his Houſe and Garden*, with a Fee of 3 *l. per Ann.* this was held good againſt the *Succeſſor*, tho' there was never any ſuch Grant before, becauſe the *Office* was neceſſary.

And yet but Three Years afterwards, *Horne* Biſhop of *Wincheſter*, granted a Rent of 3 *l.* 4 *s. &c.* to Dr. *Dale*, a Civilian, *pro conſilio impenſo & impendendo*, it was made a Quære in *Dyer*, whether it was void againſt the *Succeſſor*, but afterwards held that it was, becauſe ſuch a (*q*) Grant is not of *neceſſity*; and it was not of an *Office*, but only a voluntary Act of the Biſhop to chooſe ſuch a Man to be his Council, which his *Succeſſor* might not approve.

Blaſphemy.

'Tis an Offence,
(1.) By attributing to the Almighty any thing unbecoming his God-head.
(2.) By derogating from his Attributes.
(3.) By attributing that to the Creature which is due to God alone.

THere were formerly various Puniſhments for this Crime. *Juſtinian* the Emperor puniſhed it with Death. Sometimes it was puniſhed by cutting out the Tongue; but by the Civil Law the puniſhment did not extend to Life or Limb; for a Layman was Anathematized, and a Churchman Depoſed; and by the Canon Law, if the Blaſphemy was publickly Committed, the Offender was to undergo publick Pennance,

(*p*) Cro. Car. 48. (*q*) Dyer 370. 10 Rep. 61.

but

but even in that caſe a Biſhop could abſolve him; but for a private Blaſphemy any Prieſt might do it.

Our *Saxon* Anceſtors were not guilty of this Crime, for amongſt their Laws there is no mention of any ſuch Crime or Puniſhment for it.

H. 3. appointed that Blaſphemers ſhould be arreſted, but doth not tell us how they ſhould be puniſhed.

King *Ed.* 6. being impowered by Act of Parliament, appointed Commiſſioners to reform Eccleſiaſtical Laws, and *Archbiſhop Cranmer* was the firſt in Commiſſion, who did the whole Work almoſt himſelf; but tho' it was finiſhed it never had the Royal Confirmation, for that was prevented by the Death of the King.

However, I mentioned it to ſhew what Puniſhment the Reformers of theſe Laws thought proper to inflict on Blaſphemers, (*viz.*) that they were to be incapable of any publick Truſt and Imployment, they were not to be ſuffered to be Witneſſes in any Court, or to any Will, and were not to have the Benefit of the Law.

By the (*r*) Canon this Offence is to be preſented to the *Eccleſiaſtical Court* in order to Puniſhment; 'tis comprehended there under the Words of *Wickedneſs of Life*, for 'tis not expreſly named as Adultery, Whoredom, *&c.* and other Crimes are.

'Tis likewiſe puniſhable by the Common Law, and that by way of Indictment or Information; for all Reproaches of God, or of the eſtabliſhed Religion, as to ſay that 'tis a Cheat, or the like, tend to the Diſſolution of the Goverment it ſelf, for the Chriſtian Religion is part of the Law of the Land, and to call it a Cheat takes away all manner of Obligation to the Government it ſelf; and for this Offence one *Taylor*, *Anno.* 27. *Car.* 2. was fined 1000 Marks, and was committed until he found Sureties for his good Behaviour during Life, and was ſet in the Pillory three Times, with a Paper fixed upon it ſhewing his Offence.

Bonds of Reſignation.

THE Queſtion which I ſhall examine under this Title is, whether a Bond with a general Condition to reſign upon ſix Months Notice is good or not.

(*r*) Can. 109.

Thoſe who hold ſuch a Bond good, affirm there is no poſitive Law againſt it; but that on the contrary there is a ſolemn * Judgment given in the Court of *Queen's Bench*, that the Bond is good, becauſe there is nothing bad in the Condition, that being only to reſign upon Notice; and that which gives a greater Authority to this Judgment is, that it was affirmed upon a Writ of Error in the *Exchequer* Chamber, where all the Judges were of Opinion, that it was lawful for a Man to bind himſelf in a Penalty to reſign, becauſe that may be for good and valuable purpoſes, as to reſign if he take another Benefice, or to reſign when the Son of his Patron comes of Age.

The (ſ) Biſhop of *Worceſter* himſelf, who argues againſt the Validity of ſuch Bonds, allows that there may be a lawful Truſt in ſuch caſe for a Minor; but if the Parſon enters into a Bond to reſign, then he calls it a confidential Simony.

I wiſh he had told us, that ſince there can be ſuch a Truſt, what legal Obligation there could be to compel the Performance of it, when the Minor comes of Age, and how that Truſt ſhall be executed if the Parſon ſhall refuſe to reſign.

But he will not allow that the Judges gave a tolerable reaſon to ſupport their Judgment, for it amounted to no more than that a Bond is good, becauſe a good reaſon may be given for it, which deſerves no other Anſwer than that it may be bad, becauſe a bad reaſon may be given for it; and he inſtances ſeveral ſuch bad reaſons, *viz.* ſuch a Bond makes a Parſon a Slave to his Patron, and ſubverts the juſt Rights of the Clergy.

I ſhall only ſay that this is to araign a ſolemn Judgment given by all the Judges of *England*, in the Caſe above-mentioned, and there were ſome of them Men eminent in their Profeſſion; for my *Lord Coke* was then chief Juſtice of the Common Pleas, and *Tanfeild* chief Baron of the *Exchequer*; and the Court judged only of the Law, as it appeared before them upon the Bond with ſuch a general Condition to reſign upon Notice, there was nothing of Simony appeared to them; and if ſuch a Bond might be given upon a good Reaſon as the Biſhop admits it might, why muſt it be ſuppoſed to be void, becauſe an ill uſe may be made of it, for that is contrary to a Rule in Law, (*viz.*) *iniquum non eſt præſumendum.*

* Jones —— verſ. Lawrence. (ſ) Still. 342.

About

About Nineteen Years afterwards the like Caſe came in queſtion again in the ſame Court, between (*t*) *Babington* and *Wood*, and the like Judgment was given, I ſuppoſe, upon the Authority of the former Reſolution; for *Juſtice Jones*, who reports the Caſe tells us, that the Judges had ſeen that Preſident, and thereupon they gave Judgment for the Bond.

But the *Biſhop of Worceſter* will not allow one or two ſolemn Deciſions to paſs for Law, but only ſuch which are conſonant to one another in a long Series and Succeſſion of time, which did not happen between theſe two Judgments, for the one was 8 *Jac.* and the other 5 *Car.* 1. and that between theſe two Caſes there was another of the ſame Nature, *Anno* 15. *Jac.* where there is a contrary Judgment, *viz.* that ſuch a Bond was Simonaical.

I confeſs there is ſuch a Caſe reported by (*u*) Mr. *Attorney Noy*, not as a ſolemn Judgment, but only as an Opinion of the Court *Obiter* that it was Simony; for it appears by the very Book that it was not the Point in Queſtion, and the Report it ſelf is of no great Credit in the Law; for if the contrary Opinion *Anno* 8 *Jac.* was Law, and ſo held by the unanimous Opinion of all the Judges of *England*, 'tis ſtrange it ſhould be altered by one Court, and but ſeven Years afterwards; and that neither my *Lord Herbert*, who was then Chief Juſtice, nor *Hutton* one of the Judges of that Court, nor any other Reporter of that time ſhould take any Notice of it beſides Mr. *Noy*.

We are told by the ſame (*x*) Biſhop, that ſuch a Bond hath been condemned in Equity, when an ill uſe hath been made of it, and 'tis reaſon it ſhould; and I believe a perpetual Juriſdiction was decreed againſt it, not becauſe it was Simonaical, but becauſe the Patron made a bad uſe of it to defraud the Parſon of his Tythes; for it was agreed on all Sides, that the Bond it ſelf was good, and ſo is this Condition following.

Whereas P. S. *is within a ſhort time to be preſented, inſtituted and inducted to the Church of* H. *in the County of* S. *if therefore the ſaid* P. S. *ſhall after his Admiſſion, Inſtitution, and Induction thereunto, at any time, upon the Requeſt of* E. T. *his Heirs, Executors or Adminiſtrators, reſign the ſaid Church or Rectory of* H. *to the Ordinary of the Dioceſs of* C. *for the time being, ſo that the ſaid* E. T. *Patron of the ſaid Church, or his Heirs, may preſent*

(*t*) Cro. Car. 284. Jones 220. (*u*) Noy 22. (*x*) 2 Chance Rep. 186

again to the ſame, diſcharged of all Incumberances done or ſuffered by the ſaid P. S. *that then*, &c.

Upon the whole matter theſe Bonds to reſign *generally upon Notice*, have been held good both in Law and Equity, tho' we are told they are Simoniacal, becauſe they are Bargains to obtain Preſentations, and contrary to the Oath which Clergymen take, (*viz.*) *That they have not made any Simonaical Contract or Promiſe whatſoever concerning the ſame.*

I ſhall not controvert this Matter whether 'tis ſo or not, I have declared what the Law is in reference to ſuch a Bond, and ſhall only add, that if 'tis put in Sute and the Defendant pleads *Reſignavit* on ſuch a Day to the (*y*) Biſhop, and that he accepted it, this ſhall be tried by the County, and not by Certificate from the Biſhop.

And here, by the way, 'tis to be obſerved, that a Benefice with Cure cannot be void by the ſole Act of the Party, *viz.* by Reſignation, without the Acceptance of the Biſhop, becauſe he is to give Notice to the Patron that he may preſent again; but if he refuſes to accept it, then nothwithſtanding the Reſignation the Incumbent continues ſo ſtill.

Burial.

THE Freehold of the Church is in the Incumbent, and ſo is the Freehold of the Church-yard, and therefore none can be buried in the Church wihout Leave, but they may in the Church-yard, becauſe 'tis the Burying-Place of the People; and tho' he gives leave to bury in the Church, yet ſomething may be due to the (*z*) Churchwardens, by Cuſtom, for buring there.

But a Miniſter cannot refuſe to bury the Dead, if he doth, having Notice, and the Corps being brought to the (*a*) Church, he ſhall be ſuſpended from his Miniſtry for three Months.

By the Statute 30 *Car.* 2. *cap.* 3. the Mininiſter of every Pariſh is to keep a Regiſter of the Burials, and of Affidavits of Perſons buried in *Woollen.*

Theſe Affidavits muſt be brought within Eight Days after the Burial, if not, the Miniſter muſt enter a *Memorandum* of the Default, and of the time when he gave Notice thereof to the Pariſh Officers, which Notice muſt be given in Writing under the Hand of the Miniſter, and this may be done at

(*y*) Sid. 317. (*z*) 2 Cro. 367. (*a*) Can. 68.

any

any time, but the beſt way is ſoon after the Eight Days are expired, the Miniſter making Default in any of theſe particulars, forfeits five Pound.

The Affidavit muſt be taken by a Juſtice of Peace, Mayor, or ſuch like Officer in the Pariſh where the Party was buried; and if there is none in that Pariſh, then by a Miniſter in the County, excepting in that Pariſh the Corps was buried.

He who takes the Affidavit muſt ſet his Hand to it, and it muſt be atteſted by two Witneſſes, who were preſent at the taking it.

Canons.

Under this Title I ſhall comprehend,

(1.) Foreign Canons.
(2.) Such which have been received here.
(3.) The Power of making New Canons.

AS to the Firſt, *Conſtantine* the Great, and the Firſt Emperor, who gave Chriſtians ſome reſpite from Perſecution, cauſed general Councils and national and provincial Synods to be aſſembled in his Dominions, where amongſt other things Rules were made for the Government of the Church, which were called Canons, the Subſtance whereof was at firſt collected out of the Scriptures, or the ancient Writings of the Fathers.

I ſhall not trouble the Reader with a long Hiſtory of provincial Conſtitutions, Synodals, Gloſſaries, Sentences of Popes, Summaries, Reſcripts, and other Rhapſodies with which the Canon Law hath by degrees been compiled ſince the Day of that Emperor; 'tis ſufficient to ſhew, that theſe things were collected in three Volums, by *Ivo Biſhop of Chartres*, about the 14th Year of our (*b*) King *H.* 1. which are commonly called the *Decrees*, and theſe were corrected about Thirty five Years afterwards, by (*c*) *Gratian* a Benedictine Monk, and are now the moſt ancient Volums of the Eccleſiaſtical Law.

Theſe Decrees were not at firſt ſtanding Rules to bind the People in general, but were only made for the Government of the Clergy.

In a ſhort time afterwards Attempts were made by the papal Authority, to draw the Laity to obey theſe Decrees,

(*b*) Anno 1114. (*c*) Rydly 98.

and

and this was done, as ſome Authors tell us, *Timide & precario*, by propoſing certain Rules for Faſting-Days, which were called by the mild and gentle Name of *Rogations* and not *Canons*; and the *Laity*, by this means, complied to obey them.

But all the Eccleſiaſtical Laws of *England* were not derived from *Rome*; for tho' ſome foreign Canons were received here before the Conqueſt, yet the *Saxon Kings*, after they were converted from *Paganiſm*, did, by the Advice of their Clergy within this Realm, make ſeveral Ordinances for the Government of the Church; and after the Conqueſt ſeveral provincial Synods were held here, in which Conſtitutions were made, which are part of our Eccleſiaſtical Laws at this Day.

Theſe Decrees, corrected by *Gratian*, were publiſhed in *England* in the Reign of King *Stephen*, and the reaſon of the Publication at that time, might be to decide the Quarrel between *Theobald* Archbiſhop of *Canterbury*, and *Henry* Biſhop of *Winton*, the King's Brother, who being made a *Legate*, the Archbiſhop looked upon it as a Diminution of his Power, and an Encroachment upon that Priviledge which he had as *Legatus natus*.

However theſe *Decrees* were received by the Clergy of the *Weſtern* Church, but never by thoſe of the *Eaſt*, which is the reaſon why their Prieſts might marry, which thoſe of the *Weſt* did not, becauſe they were prohibited by theſe Decrees.

The next, in order of time, were the *Decretals*, which are canonical Epiſtles written by Popes alone, or aſſiſted by ſome Cardinals to determine any Controverſie, and of thoſe there are likewiſe Three Volums.

The firſt was compiled by *Raimundus Barcinius*, who was *Chaplain* to Pope *Gregory* the Ninth, and publiſhed by him about the 14th Year of our King * *H.* 3; this was appointed to to be read in all Schools, and was to be taken for Law in all Eccleſiaſtical Courts.

About Sixty Years afterwards *Simon a Monk of Walden* began to read theſe Laws in the Univerſity of *Cambridge*, and the next Year in *Oxford*.

The ſecond Volume was collected, and put into Method by Pope *Boniface* the 8th, and publiſhed about the 27th (*d*) Year of our King *Ed.* 1.

The third Volume was collected by Pope *Clement* the 5th,

* Anno 1226. (*d*) Anno 1298.

and

and publiſhed in the Council of *Vienna*, and likewiſe here, (*e*) *Anno* 2 *Ed.* 2. and from him were called the *Clementines*.

Each of theſe Volums is divided into five Books, containing almoſt the ſame Titles.

The firſt Book contains the Authority of Cuſtomes, Conſtitutions and Reſcripts, the mannor of confirming and conſecrating Archbiſhops and Biſhops; it treats of *Reſignation* of Benefices, the Duties of Biſhops to inſpect the inferior Clergy, that Divine Service may be performed; the Times of ordering Perſons to the Miniſtry, and how they are to be qualified, that Miniſters Sons ſhould not immediately ſucceed their Fathers in the ſame Benefice, that no Villains, Bigamiſts, or deformed Perſons be admitted to Holy Orders.

Then it ſets forth the Antiquity and Office of Archdeacons, Vicars, Judges Delegates, and many other matters relating only to the Perſons of ſuch who are concerned in Eccleſiaſtical affairs.

The ſecond Book of the Decretals treats of Things and not of Perſons; as for inſtance: It treats of the manner of Citations, Libels, and proceedings therein to Sentence, and ſomething concerning Appeals.

The third Book treats of the Lives and Behaviour of Clerks, who may be married, and in what caſes they may be *non-reſident*: Then it treats of Prebends and Dignities; which may be had by Inſtitution from the Biſhop, of the Avoidance of Benefices, and time of Laps, that Biſhops ſhall not ſell, *&c*, without the conſent of the Chapter; in what caſes the Goods of the Church may be ſold, and in what not.

Then follows a Treatiſe of laſt Wills, the Succeſſion of Inteſtates, a Diſcourſe of Tythes, Burials, firſt Fruits and Offerings, of the Right of Patronage, of Synodals and Procurations, of Conſecration of Churches, Celibacy, Divine Service, Euchariſt, Monks, Baptiſm, of Papiſts not baptized, Faſting, Purification of Women, building and repairing Churches and Church-yards, Clerks not to middle in civil Affairs.

The fourth Book treats of the difference between Eſpouſals and Marriage; of clandeſtine Marriages, and how to be made good; of a Woman promiſing two Men whoſe Wife ſhe ſhall be; of a Man marrying a Woman with whom he had formerly committed Adultery, if ſhe did not know that he had a Wife then living he cannot leave her after the Death

(*e*) Viz. 1308.

of

of his firſt Wife; whether leprous Men may marry or not; of him who hath known his Wife's Siſter, or his own Couſin German, within what Degrees of Conſanguinity or Affinity a Man may marry; what Children are legitimate; of Divorces, and of ſecond Marriages.

The fifth Book treats of criminal Matters, in which the *Spiritual Court* hath Juriſdiction, as Simony, of Hereticks, Schiſmaticks, the Puniſhment of *Jews* that they ſhall not take a Chriſtian to be their Servant; that if a Servant is a *Jew*, they ſhall ſell him to a Chriſtian for a Shilling.

That they may repair their old Synagogues, but not build new ones; that they ſhall not open their Doors or Windows on *Good Friday*; that their Wives ſhall not have Chriſtian Nurſes, or be Nurſes to Chriſtian Women; that they wear diſtinct Apparel from Chriſtians.

Then it treats of Apoſtates, Anabaptiſts, the Puniſhment of killing our own Children; of Childeren expoſed to the Compaſſion of others; of Murders and Manſlaughter; of Whoredom, Adultery, Rape, Thieves, Robbers, Uſury, Deceit, Falſhood, Sorcery, Colluſion, Coſenage, Children not to be puniſhed as Men; of Clerks who are Hunters and Hawkers, *&c.*

Theſe *Decretals* were never received here, or any where elſe, but only in the Pope's Dominions, as particularly the *Canon*, concerning Inveſtiture of Biſhops by a Lay Hand.

About the 10*th Year* of the ſame King *Ed.* 2. *Pope John the* 22*d* publiſhed his *Extravagants*.

Now as to us here in *England*, even at that time when the papal Authority was at the Higheſt, none of theſe foreign *Canons*, or any new *Canons*, made at any national or provincial Synod here, had any manner of Force, if they were againſt the Prerogative of the King, or the Laws of the Land.

'Tis true, every Chriſtian Nation where the Pope's Supremacy was acknowledged, ſent ſome Biſhops, Abbots, or Priors, to thoſe *foreign Councils*, and generally Four were ſent out of *England*, and it was by that means, together with the Allowance of the civil Power, that ſome Canons made there, were received here, but ſuch which were againſt the Laws were totally rejected; I ſhall inſtance in a few, and ſo proceed.

In the (*f*) *Extravagants of Pope John*, there is a Canon

(*f*) Tit. de decimai cap. 13.

that

that a Biſhop ſhall have the Tythes of all ſuch Land within his Dioceſs, which is not appropriated to any Pariſh.

Anno 7 Ed. 3. a Queſtion ariſing, who ſhould have the Tythes of ſuch parts of *Foreſt Lands* which were not within the Bounds of any particular; Sir *William Herſe*, who was then chief Juſtice of the *Common Pleas* held, that the Biſhop of the Dioceſs ſhould have them, and probably he grounded his Opinion upon this Canon, but my (*g*) *Lord Coke* tells us, that Canon was never received here, for it was the Prerogative of the King to grant ſuch Tythes to whom he would, and accordingly, *Anno* 22. *Ed.* 3. the Grantee of the King brought an Action againſt ſome Eccleſiaſticks, concerning Tythes ariſing in *Rockingham Foreſt*; and then *Thorp*, *Chief Juſtice* of the ſame Court, held the Right to be in the King, and by conſequence in his Grantee.

But *Simon Iſlip*, who was then Archbiſhop of *Canterbury*, being a Man of an ambitious Temper, and not contented with that Grant which he had got from the Pope to receive a Subſidy of all the Clergy of the Dioceſs, for the better Support of his Archiepiſcopal Dignity, petitioned the King in Council, that he might have thoſe Tythes; and becauſe the Matter was not then determined by the (*h*) Council, the chief Juſtice gave no Judgment in the Caſe depending before him.

Another Inſtance is, that by the *Canon Law* Parſons were to repair the Pariſh Churches, but this being contrary to the (*i*) Cuſtom of the Realm, that Canon was never received here, for the Pariſhioners always repair it.

The Canon in the *Decretals*, that Children Born before Marriage ſhould be Legitimate, if the Parents afterwards Married was not received here. 'Tis true, ſome attempts were made in Parliament to Eſtabliſh this into a Law, and particularly by the (*k*) Parliament of *Merton*, when the Biſhops interceeded with the Temporal Lords for that purpoſe, but anſwered *una voce*, that they would not change the Laws of the Land; and (*l*) *Glanvil* tells us, what was then attempted was *contra jus & conſuetudinem Regni.*

By a Canon made, at a Council held at *Lyons*, a Man twice Married, or who had Married a Widow, was not to have the benefit of his Clergy upon a Conviction for Felony. The *Biſhops* in thoſe days interpreted this Canon, to extend

(*g*) 2 Inſt. 647. (*h*) 28 Aſſize Plito. 75. (*i*) 2 Inſt. 653. (*k*) Cap. 9. (*l*) Lib. 7. cap. 15.

only

only to ſuch who were twice Married after that Council, and therefore demanded thoſe Clerks who were twice Married before, but becauſe the Judges of the Common Law had a right to determine the allowance of this Privilege, and becauſe by the diſallowance the life of a Man was to be taken away, therefore they would not allow this Canon till it was declared in Parliament, that as well thoſe who were Married twice before, as thoſe who were twice Married after, the Council ſhould not be delivered to the Prelates, but ſhould be deprived of the benefit of their Clergy :

But this is now taken away by the Statute 1 *E.* 6. *cap.* 12.

So the Canons for exempting the (*m*) Clergy from the Temporal Juriſdiction were never abſolutely received here ; 'tis true, the Clergy had many Privileges, but were never totally exempted from Trials in the King's Court.

So the Canons concerning Appeals, Proviſors, Diſpenſations, *&c.* were never received here by the general conſent of the People ; for ſometimes they were oppoſed, and at other times obeyed, as the Authority of the Pope prevailed here.

That Canon in the *Decretals*, prohibiting the Son of a Clergyman immediately to ſucceed his Father in the ſame Benefice, without a Diſpenſation from the Pope, never prevailed here. This was the opinion of Juſtice *Doderidge*, in the Caſe of *Stokes* and *Sykes*, where the Son was preſented by a Lay Patron to the Benefice, after his Father ; the Biſhop refuſed to admit him, by reaſon of this Canon ; thereupon the Patron preſented *Sykes*, who was Admitted, Inſtituted and Inducted ; and the Biſhop and Incumbent were Sued in the *Delegates*, but they obtained a Prohibition, and the Book makes a *Quære* what remedy for the firſt Preſentee.

In many other Caſes, *Foreign Canons* were never received here. As that concerning the Marrying the Woman with whom he had committed Adultery ; the prohibiting any Sale of Advowſons ; the revocation of a Preſentation by a Spiritual Patron, and ſeveral others.

But ſome of theſe *Foreign Canons* were received here, and obtained the force of Laws, by the general approbation of the King and People ; (tho' it may be difficult to know what theſe Canons are) and it was upon this pretence that the Pope claimed an Eccleſiaſtical Juriſdiction here, independent of the King, and ſent his Legates hither, with Commiſſions, to determinate Cauſes according to thoſe Canons.

(*m*) Poph. 157. (*n*) Latch. 191.

This

This created Quarrels between Kings and ſeveral Archbiſhops, and other Prelates, who adhered to thoſe Papal Uſurpations. For ſuch *Foreign Canons* which were received here, never had any force from any Papal Legatine, or Provincial Conſtitutions, but from the acceptance and uſage of the Church here: For the Biſhops who were ſent from hence to aſſiſt in *Foreign Councils*, conſented to the Canons made there, yet that did not (*o*) bind till allowed by the King and People, as I have already obſerved.

However, when a Canon is thus received upon an ancient Practiſe and general conſent of the People, in ſuch Caſe 'tis part of the Law of the Land.

Beſides theſe *Foreign Canons*, there were ſeveral Laws and Conſtitutions made here, for the Government of the Church, all which are now in force; but had not been ſo without the Aſſent and Confirmation of the Kings of *England*. For even from *William* the Firſt, to the time of the Reformation, no Canons or Conſtitutions made in any *Synods* here were ſuffered to be Executed if they had not the Royal Aſſent. And this was the common uſage and practice here, when the Papal uſurpation was moſt exalted; for if at any time the Eccleſiaſtical Courts did by their Sentences endeavour to enforce Obedience to ſuch Canons, the Courts, at Common Law, upon Complaint made, would grant Prohibitions.

So that the Statute of Submiſſion, which was afterwards made *Anno* 25 *Hen.* 8. ſeems to be Declarative of the Common Law, that the Clergy could not *de jure*, and by their own Authority, without the King's aſſent, Enact or Execute any Canons.

Theſe Canons were all Collected and Explained by *Lyndwood*, Dean of the *Arches*, in the Reign of *Hen.* 6. and by him reduced under this Method.

(1.) The Canons of *Stephen Langton*, Cardinal and Archbiſhop of *Canterbury*, made at a Council held at *Oxford Anno* 6 *Hen.* 3.

(2.) The Canons of Cardinal *Otto*, the Pope's Legate, who held a general Council in St. *Paul's* Church, *Anno* 21 *Hen.* 3. which from him were called the Conſtitutions of *Otto*; upon which *John de Athon*, one of the Canons of *Lincoln*, did write a Comment.

(3.) The Canons of *Boniface* of *Savoy*, Archbiſhop of *Canterbury*, *Anno* 45 *Hen.* 3. which were all uſurpations upon

(*o*) Latch 234. Palm 458. Jones 169.

the

the Common Law, as concerning the boundaries of Pariſhes; the right of Patronage, and againſt Trials of the right of Tythes in the King's Courts, againſt Writs of Prohibition, *&c.*

And tho' he threatned the (*p*) Judges with Excommunication (of which ſome were then Clergy-men) if they diſobeyed the Canons, yet they proceeded in theſe Matters according to the Laws of the Realm; and kept the Eccleſiaſtical Courts within their proper Juriſdiction.

But this occaſioned a variance between the Spiritual and Temporal Lords, and thereupon the Clergy, 31 *Hen.* 3. exhibited ſeveral Articles of their Grievances to the Parliament, which they called *Articuli Cleri*, the Articles themſelves are loſt, but ſome of the Anſwers to them are extant; by which it appears that none of thoſe Canons made by *Boniface* were Confirmed.

(4.) The Canons of Cardinal *Ottobon*, the Pope's Legate, who held a *Synod* at St. *Paul's*, *Anno* 53 *Hen.* 3. in which he confirmed thoſe Canons made by his Predeceſſor *Otto*, and Publiſhed ſome new ones; and by his Legatine Authority commanded that they ſhould be Obeyed: Upon theſe Canons, likewiſe, the ſaid *John de Athon* wrote another Comment.

(5.) The Canons of Archbiſhop *Peckham*, made at a *Synod* held at *Reading*, *Anno* 1279. 7 *Edw.* 1.

(6.) The Canons of the ſame Archbiſhop, made at a *Synod* held at *Lambeth*, Two Years afterwards.

(7.) The Canons of Archbiſhop *Winchelſea*, made *Anno* 34 *Edw.* 1.

(8.) The Canons of Archbiſhop *Reynolds*, at a *Synod* held at *Oxford Anno* 1322. 16 *Edw.* 2.

(9.) The Canons of *Symon Mepham*, Archbiſhop of *Canterbury*, made *Anno* 1328. 3 *Edw.* 3.

(10.) Of Archbiſhop *Stratford*.

(11.) Of Archbiſhop *Symon Iſlip*, made *Anno* 1362. 37 *Edw.* 3.

(12.) Of *Symon Sudbury* Archbiſhop of *Canterbury*, made *Anno* 1378. 2 *Rich.* 2.

(13.) Of Archbiſhop *Arundel*, made at a *Synod* at *Oxford*, *Anno* 1403. 10 *Hen.* 4.

(14.) Of Archbiſhop *Chicheley*, *Anno* 1415. 3 *Hen.* 5.

(15.) Of *Edmond* and *Richard*, Archbiſhops of *Canterbury*, who immediately ſucceeded the aforeſaid *Stephen Langton*.

(*p*) 2 Inſt. 599.

But

But theſe Canons being made in times of Papal Authority here, were ſoon after the Reformation intended likewiſe to be Reformed by Archbiſhop *Cranmer*, and ſome other Commiſſioners appointed for that purpoſe, by *Hen.* 8. and *Edw.* 6. the work was finiſhed, but the King dying before it was confirmed, it ſo remains to this day.

The Book is called *Reformatio Legum Eccleſieſticarum ex Authoritate Regis*, Hen. 8. *inchoata & per* Edw. 6. *provecta*, &c. it was put into elegant Latin by Dr. *Haddon*, who was then Univerſity Orator of *Cambridge*, aſſiſted by Sir *John Cheek*, who was Tutor to *Edw.* 6.

The next thing to be conſidered is, the Authority of making Canons at this day; and this is grounded upon the Statute 25 *Hen.* 8. commonly called the (*q*) Act of Submiſſion of the Clergy, by which they acknowledged that the *Convocation* had been always aſſembled by the King's Writ; and they promiſed in *verbo Sacerdotis*, not to attempt, claim, or put in uſe, or enact, promulge, or execute any *new Canons*, in Convocation, without the King's Aſſent or Licence.

Then follows this enacting Clauſe, *viz.* That they ſhall not *attempt, alleage or claim, or put in uſe* any Conſtitutions or Canons without the King's Aſſent. And ſo far this Act is declarative of what the Law was before; for Archbiſhop *Hubert* holding a provincial Council in the Reign of *R--ſ.* was prohibited to proceed in it by *Jeffery Fitzpeter*, who was then Chief Juſtice of *England*, becauſe he had not the King's leave.

But the Clauſe beforementioned extends to ſuch Canons which were then made both *Beyond-Sea and here*, viz. to *Foreign Canons*, that they ſhould not be executed here till received by the King and People as the Laws of the Land; and to Canons made here which were contrary to the Prerogative or to the Laws and Cuſtoms of the Realm.

This appears by the Proviſo, That no Canons ſhall be made *or put in Execution* within this Realm, which ſhall be contrary to the Prerogative or Laws.

But the next are negative Words, which relate wholly to *making new Canons*, viz. *nor make*, promulge or execute any ſuch Canons without the King's Aſſent.

Theſe words limit the Clergy in point of Juriſdiction, *viz.* That they ſhall not *make any new Canons* but in Convocation; and they cannot meet there without the King's Writ; and when they are met and *make* new Canons, they cannot put

(q) Hen. 8. cap. 19.

them in Execution without a confirmation under the Great Seal.

Some years after this Statute the Clergy proceeded to act in Convocation, without any Commiſſion from *Hen.* 8. But the Canons which they made were confirmed by that King, and ſome of his Succeſſors, as particularly the Injunctions Publiſhed *Anno* 28 *Hen.* 8. for the aboliſhing ſuperſtitious Holy-days; thoſe for Preaching againſt the uſe of Images, Reliques and Pilgrimages; thoſe for repeating the Creed, the Lords Prayer and Ten Commandments in the Engliſh Tongue.

Sometimes that King proceeded by the advice of his Biſhops out of Convocation, as about the Injunctions Publiſhed *Anno* 30 *Hen.* 8. for admitting none to Preach but ſuch who were Licenſed: Thoſe for keeping a Regiſter of Births, Weddings and Burials; for the aboliſhing the Anniverſary of *Thomas Becket.*

The like may be ſaid of thoſe Injunctions Publiſhed *Anno* 2 *Edw.* 6. prohibiting carrying Candles on *Candlemas-day*, and Aſhes in *Lent*, and Palmes on *Palm-Sunday.*

Queen *Elizabeth* in the Second Year of her Reign Publiſhed ſeveral Injunctions by the advice of her Biſhops. And Two Years afterwards ſhe Publiſhed a Book of Orders without the confirmation of her Parliament.

'Tis true, when ſhe was ſettled in her Government, all Church affairs were debated in Convocations authorized by her Power. And ſeveral Canons were made in her Reign, and confirmed by her Letters Patents; but becauſe ſhe did not bind her Heirs and Succeſſors to the obſervance of them, thoſe Canons expired with that Queen.

The old Canons were ſtill in force in all thoſe Reigns abovementioned. But (*q*) *Anno* 1 *Jac.* the Clergy being lawfully aſſembled in Convocation, the King gave them leave by his Letters Patents to *Treat, Conſult and Agree* on Canons, which they did, and preſented them to him, who gave his Royal Aſſent; and by other Letters Patents did for himſelf, his Heirs and Succeſſors, ratify and confirm the ſame. Theſe Canons thus Eſtabliſhed were not then invented, but were Collected out of ſuch Ordinances which laid diſperſed in ſeveral Injunctions Publiſhed in thoſe former Reigns, and out of ſuch Canons and other Religious Cuſtoms which were made and uſed in thoſe days; and being thus confirmed are the Laws of the Land, and by the ſame Authority as any other part of the (*r*) Law; For being Authorized by the

(*q*) Anno 1603. (*r*) Vaug. 327.

King's

King's Commiſſion according to the form of the Statute 25 *Hen.* 8. they are warranted by Act of Parliament; and ſuch Canons ſo made and confirmed ſhall bind in (*s*) Eccleſiaſtical Matters as much as any Statute.

'Tis true, an Act of Parliament may abrogate any Canon, unleſs it conſiſts in enjoining ſome Moral Duty; but a Canon not confirmed by an (*t*) Act of Parliament cannot alter any other Law. 'Tis agreed that Canons made in Convocation and confirmed by Letters Patents bind in all Eccleſiaſtical Affairs, that no Canons in *England* are abſolutely confirmed by Parliament, yet they are part of the Laws of the Land, for the Government of the Church; and in ſuch caſe bind the Laiety as well as the Clergy, that tho' ſuch Canons cannot alter the Common Law, Statutes, or Queen's Prerogative, yet they may alter other Canons, otherwiſe the Convocation could not make new Canons. All that is required in making ſuch Canons is, that the Clergy confine themſelves to Church Affairs, and not to meddle with ſuch things which are ſettled by the Common Law.

Some of thoſe Canons made in 1603. are now obſolete, and do not concern either the Government of the Church, or the right of any particular Perſon; as for Inſtance the 74th Canon, which requires that the beneficed Clergy ſhall wear *Gowns* with *ſtanding Collars, and Square Caps*; and when they Travel they ſhall wear *Cloaks with Sleeves*, but without long Buttons.

That a Pariſh Clerk ſhall be a Man who can Write and Read, and be competently skilled in Singing.

Theſe things are ſeldom or never made any Articles of a Viſitation, for the Habit is totally diſuſed, tho' the Reaſon ſtill continues, *viz.* That there ſhould be a decency amongſt Clergy-men to procure their outward Reverence; but for Pariſh Clerks, 'tis generally known, thoſe in the Country cannot Write, and ſome can ſcarce Read or Sing.

So that we ſee Cuſtom prevails againſt the ſtanding Canons of the Church, and 'tis reaſonable it ſhould be ſo, for otherwiſe we muſt not Kneel at Prayers between *Eaſter* and *Whitſuntide*, which was anciently prohibited: And the general diſuſe of a Canon, not in contempt to Authority, but by a tacite connivance of our Governors, and without any admonition to obey it, may in ſome meaſure abate its force.

Now, as to the Matter of thoſe Canons, that which tends to promote the Honour of GOD and Service of Religion,

(*s*) Moor 783. (*t*) 2 Vent. 42.

must neceſſarily bind our (*u*) Conſciencies. And ſuch are thoſe which enjoyn the ſober converſation of Miniſters, prohibiting their frequenting Taverns, playing at Dice, Cards or Tables: This was anciently prohibited by the Apoſtolical Canons, and in the old Articles of Viſitation here, and in ſeveral Dioceſan Synods.

So are thoſe Canons which relate to the Duties of Miniſters in Praying, Preaching, Adminiſtring the Sacraments, and Viſiting the Sick, all theſe are obligatory in point of Conſcience.

I ſhall conclude this Article with the Canons made in 1640. tho' they are not in force, and the Reaſon is as followeth.

In the Year 1639, a Parliamentary Writ was directed to the Biſhops to Summon their Clergy to Parliament *ad conſentiendum, &c.* and the Convocation Writ to the Archbiſhops *ad tractand. & conſentiend.*

The Parliament met on the 13th of *April*, 1640. and was diſſolved on the 15th of *May* following.

Now, tho' the Convocation ſiting by vertue of the firſt Writ directed to the Biſhops, muſt fall upon the diſſolution of that Parliament, yet the Lawyers held that they might ſtill continue ſiting by virtue of the King's Writ to the Archbiſhops: for being called by that Writ, under the Great Seal, they might ſit till diſſolved by the like Authority.

But this being a nice Point, a Commiſſion was granted about a Week after the diſſolution of the Parliament, for the Convocation to ſitt, which they did, and made theſe Canons, which were confirmed by the King.

The Objection againſt them was, That they were not made purſuant to the Statute 25 *Hen.* 8. beforementioned, becauſe they were made in a Convocation, ſitting by the King's Writ to the Archbiſhops, *after the Parliament was diſſolved*, tho' there is nothing in the Statute which relates to their ſiting *in time of Parliament only*; yet that being the proper time for the Convocation to ſit, the making theſe Canons at any other time was imputed to the Biſhops as a fault, and to move the People againſt their whole Order; which was afterwards abrogated in thoſe Tumultuous times which followed.

Therefore, after the Reſtoration, *&c.* an Act was made to reſtore them likewiſe to their ordinary Juriſdiction, in which Act there was a Proviſo that it ſhould not confirm thoſe Canons made in the (*x*) Year 1640. which Clauſe or Proviſo makes the King's confirmation void. And thus the Eccleſiaſtical Laws were left as they were before the Year 1639.

(*u*) Canon 75. (*x*) 13 Car. 2. cap. 12.

From

From hence we may conclude, that Canons ſhould be made in a Convocation, ſiting the Parliament that being ſo made, they are to be confirmed by the Queen, and that without ſuch Confirmation they do not bind the Laity, much leſs any Order or Rule made by a Biſhop alone, where there is neither Cuſtom or Canon for it; as for inſtance: The (y) Ordinary commanded that a Woman coming to be churched ſhould be in a Vail, and kneel at her Entrance into the Church, and pray towards the *Eaſt*, this was held to be void, becauſe the Biſhop had not Power to impoſe ſuch new Ceremonies, where there was neither Cuſtom or Canon to warrant them.

Cathedrals; See Churches.

Cathedraticum.

THIS is a Tribute due to the Biſhop from his inferior Clergy, (*viz.*) *a qualibet Eccleſia*, at the time of his Viſitation, or as (z) Sir *Henry Spelman* tells us, *per Dioceſim Ambulans*, that is in his Viſitation by Pariſhes.

The Sum at firſt was incertain, but at the ſecond Council held at *Braga* in *Portugal*, it was limited to two Shillings; and by the ſeventh Council of *Toledo* in *Spain*, it was decreed, that he ſhould not preſume to take any more.

This Payment began when the Revenues of the Church were no longer received by the Biſhop, for in the firſt Ages of Chriſtianity he received all, and diſtributed part to his Clergy for their Maintenance; but when once the Clergy had a fixed and ſettled Maintenance, then they began to claim this Duty in Nature of a Rent paid by the Tenant to his Lord, of whom he holds, *in Argumentum Subjectionis*, and it was called *Cathedraticum in honorem Cathedræ*, and 'tis now become *onus Eccleſiaſticum*, but 'tis not by Innovation, for 'tis ſettled by Preſcription.

Caveat.

'TIS uſual where the Right of Patronage is likely to be conteſted, for a *Caveat* to be entered with the Biſhop's Regiſter by one of the contending Parties, thus:

(y) 2 Rol. Abr. 225. (z) Spelm. Glos in verbo.

Caveat Epiſcopus C. *ne quis admittatur ad Eccleſiam de* H. *niſi convocatus*, R. B. *&c.*

The *Canoniſts* allow this to be done *in the Life-time* of the Incumbent, *quia veretur damum futurum*; and that if another is inſtituted after ſuch a *Caveat* entered, without Notice given to him who entered it, the Inſtitution is void.

But 'tis otherwiſe at (*a*) Common Law, for a *Caveat* is only for the Benefit of the Biſhop, and to prevent his being found a Diſturber; it doth not preſerve *jus illæſum* ſo as to make all Subſequents Proceedings void, becauſe it doth not come from any Superior; 'tis the ſame in the Spiritual Court as 'tis in the Temporal; that is, 'tis only a cautionary Act for the better Information of the Judges.

As for inſtance: A (*b*) *Caveat* entered in the Court of *Chancery* that a Patent ſhould not paſs, or in the Queen's *Silver-Office* that a Fine ſhould not paſs, yet if a Patent, or Fine, paſſeth after ſuch *Caveat*, 'tis not void; 'tis true, *Fieri non debet ſed factum valet.*

The Law is the ſame in the Spiritual Court; for if a *Caveat* is put in againſt an Adminiſtration, yet if 'tis granted afterwards, 'tis not void.

So where a Diſpute was between two Perſons who ſhould be rightful Patron to a Church, one entred a *Caveat* with the (*c*) Biſhop *in the Life-time of the Incumbent*, but he was very Ill, and died the next Day; notwithſtanding this *Caveat* the Biſhop admitted and inſtituted the Preſentee of the other, but he was not inducted, it was adjudged that the firſt Inſtitution was not void, for if it ſhould, it would be in the Power of the Biſhop to defeat any Patron of his Preſentation; as for inſtance: When a Church is void he may cauſe any one to enter a *Caveat*, and then grant Inſtitution to the Perſon preſented, and avoid it again after ſix Months, by vertue of the *Caveat*, and ſo preſent by Laps.

'Tis reaſonable therefore, that the (*d*) Church ſhould be full upon an Admiſſion and Inſtitution after a *Caveat*; and when Suits have been brought in the *Spiritual Court* to avoid ſuch Inſtitutions the Courts of *Common Law* have granted prohibitions; for 'tis no more than a Breach of a *Canon*, and doth not make the Inſtitution void.

Cautione admittenda; See Excommunication.

(*a*) Pop. 133. (*b*) Sid. 372. (*c*) 1 Rol. Rep. 192. 227. 2 Rol. Rep. 7. 2 Cro. 463. 2 Rol. Abr. 220. (*d*) 2 Rol. Abr. 361.

Ceſſion.

THIS is when the Incumbent of any Living is promoted to a *Biſhoprick*, the Church in ſuch Caſe is void by *Ceſſion*.

It hath been *Vexata Queſtio*, whether the Queen or Patron ought to preſent upon ſuch Promotion.

'Tis true, this Point is not determined either in the Year-Books, or any other ancient Books of the Law; and the Reaſon may be, becauſe the Kings of *England*, in thoſe Days, ſeldom made uſe of this Prerogative, and if ever they claimed it, 'twas very tenderly, for the Pope challenged the Diſpoſal of all Preferments in the Church.

This occaſioned the making the (*e*) Statute againſt Proviſors, to prevent his Collations to Benefices in *England*, and to give them to the King as Patron Paramount.

But notwithſtanding this Law, even that King and his Succeſſors did ſuffer the Pope ſtill to collate upon *Promotions*, and ſeldom or never diſputed it with him, but a Method was found out to ſave the Prerogative; for when a Parſon was made a Biſhop, it was uſual to grant the Temporalties to him before Conſecration, and this prevented the King's Right of (*f*) Patronage, which Right he had whilſt the Temporalties were in his Hand; but that was not by vertue of his Prerogative, for during that time he had a temporary Right to preſent as lawful Patron; and it was clear that the Benefice which the Biſhop had, as Parſon, was not void till he was conſecrated.

In 11 *H.* 4. 7. 37. which was about ſixty Years after the aforeſaid Statute, it was agreed that the Patron ſhould preſent upon a *Promotion*; *Hill*, one of the Judges of the *Common Pleas* diſtinguiſhed, that where the King was Patron, he ſhould preſent, but not to a Benefice in the Patronage of another.

And there is no other ſolemn Judgment after the making that Statute of any Preſentation by the Patron, for the Pope was ſtill allowed to collate upon Promotions till the 25 *H.* 8.

It muſt be admitted, that this is a Prerogative not mentioned in the Statute *de Prærogativa Regis*, nor by *Stamford* himſelf, who wrote a Book of the Prerogatives; but that is no Argument againſt it, for he neither mentions any Prero-

(*e*) Anno 25 Ed. 3. (*f*) 43 Ed. 3. 5.

gative to preſent by Laps, and that was never yet denied, becauſe the King is ſupreme Head of the Church.

My Lord Chief Juſtice (*g*) *Dyer Anno 6 Eliz.* was of Opinion, that the Queen had not ſuch a Prerogative; and he tells us, *Sic alii ſocii mei ſentiebant*, but that was but the Opinion of a ſingle Judge *Obiter*, it did not relate to the Caſe then in queſtion, for that was a *Quare impedit* brought by Sir *Henry Sydney* againſt the Biſhop of *Glouceſter*, and one *Reeve*, who ſucceeded *Parkhurſt*, the laſt Incumbent, who was made Biſhop of *Norwich*, and the Iſſue being joined upon his *Reſignation*, the Queſtion was, whether that ſhould be tried by the Country, and it was adjudged that it ſhould, becauſe the Avoidance is a notorious Act, and the Reſignation is only Evidence of it.

But even at that time the Practiſe was contrary to my Lord *Dyer*'s Opinion, for in that Queen's Reign Mr. *Noy* mentions no leſs than Eighteen Preſidents in the Space of forty Years, being from the 21*ſt* Year of her Reign, to the 14*th* of King *James*, where the Queen and that King preſented upon Po motions, and this the Biſhop of *Worceſter* ſuppoſes he might collect out of ſeveral Regiſters of Biſhops, where Inſtitutions are recorded, and where it may be ſeen who were preſented.

About the latter end of that (*h*) Queen's Reign, the Point came to be ſolemnly debated in the Court of *Common Pleas*, upon the Promotion of one *Davis*, who was *Vicar* of *Burnham*, to the Biſhoprick of St. *Aſaph*.

Serjeant Moor, who reports the Caſe, tells us, that the Judges would be very well adviſed before they gave any Reſolution contrary to an ancient Prerogative; and at laſt, upon view of many Preſidents, gave Judgment for the Queen againſt the Patron.

Juſtice Cr[illegible], who reports the ſame Caſe, gives the Reaſon for that Judgment, (*viz.*) becauſe the Queen having advanced the Incumbent to the Dignity of a Biſhop, 'tis by her means that the Living is void, and therefore ſhe ought to preſent.

The ſame Reaſon is given by the Canoniſts; they ſay that the Right of Patronage extends only to an Avoidance upon Death, or Reſignation, but not upon a *Promotion*, becauſe the Vacancy in ſuch Caſe is made by the Act of a Superior, and the Patron hath no reaſon to complain, when the

(*g*) Dyer 228. Owen 144.

(*h*) Wentworth Verſ. Wright, Cro. Eliz. 526, Moor 399.

Queen

Queen ſo far approves his Choice, as to advance his Preſentee to a Biſhoprick.

It may be reſembled to a known Caſe, at *Common Law* (*viz.*) if an Eſtate is given for another Man's Life, the Doner can have no Title whilſt that Man is living, tho' the Right is transferred by the Donee, from himſelf to another.

In the ſame Year, and in the ſame Court, (*i*) *Juſtice Gawdy* doubting whether the Queen had ſuch a Prerogative, my *Lord Coke* told him, that he could produce the Reſolution of all the Judges for it; and the *Lord Chief Juſtice Popham*, held it to be the common Experience at that time.

About three Years afterwards the Incumbent being made a Biſhop in *Ireland*, the Judges of the ſame Court declared that the Queen was to preſent by her Prerogative.

Anno 22 *Jac.* the (*k*) Queſtion was debated again, and then *Juſtice Hutton* was againſt the Prerogative (*viz.*) that the King could not preſent except he was *Patron*, probably he might ground his Opinion upon that of *Juſtice Hill* beforementioned, and upon the Silence of the Year-Books, where no ſuch Prerogative is to be found, but that cannot be an Argument againſt it; for tho' the King might have ſuch a Prerogative, yet he might ſuffer the *Patron* to preſent upon particular Reaſons; and 'tis generally known, that in thoſe Days the *Pope* collated upon *Promotions*; and there cannot be one Inſtance produced, where this Right was conteſted between the King and the Patron, and Judgment given againſt the King, even in the times of *Popery*, but rather the contrary; for my (*l*) *Lord Broke*, in his Abridgment, ſaith, That *Anno* 5 *Mariæ*, the *Biſhop of Ely* told him, that he had ſeen a *Preſentation* made by *Ed.* 3. to a Benefice void by *Promotion*, and that *Ratione Prærogativæ ſuæ*, tho' the *Patronage* was in another.

The like Caſe was debated again upon a New Act of Parliament, by which the Pariſh of St. *James*, within the Liberty of *Weſtminſter*, was erected out of the Pariſh of St. *Martin*; and Dr. *Tenniſon* the firſt Rector thereof, and he being made Biſhop of *Lincoln*, it was adjudged that the King and Queen ſhould preſent, and that they were not barred of this Prerogative, by a Diſpenſation to hold the ſaid Rectory *in Comendum*, for that transferred no manner of Right to the Incumbent, but only continued him Rector, and ſo ſuſpended the Avoidance for a time, which otherwiſe

(*i*) Cro. Eliz. 790: (*k*) Woodley verſ. Bp. Exon, and Manwaring. (*l*) Tit. Preſentment, Fo. 61.

would have been the Conſequence of his Promotion; and if he had died during this Diſpenſation, the Church had been void by his Death, and then the King could not preſent by his Prerogative, for that works only upon the next Avoidance, by the Promotion, tho' ſuſpended for a time, and not by Death.

Upon the whole matter the *Popes* enjoyed this Privilege before *H.* 8. as Heads of the Church; and ſince the Supremacy is veſted in the Crown, 'tis reaſonable the Queen ſhould enjoy the like Privilege; Her Predeceſſors have been in Poſſeſſion of it ever ſince the 21 *Eliz.* for by Law She is the Supreme *Patron* over all the Livings in Her Dominions, for otherwiſe, how could She have any Title to preſent by Laps.

'Tis true, the *Patron* hath a Right which is both juſt and legal, but 'tis not abſolute for the original Right of *Patronage* was by vertue of the Land which he had of the King, and on which the Church was built, which might eſcheat to the King as Lord of the Fee; ſo that what Right the *Patron* hath is only fiduciary; 'tis a Truſt repoſed in him to nominate a fit Perſon upon a Vacancy, and 'tis limited to ſix Months; if he doth not execute his Truſt in that time, then it devolves to the Ordinary, and ſo to the Queen, but not in Right of the *Patron*, for that is extinguiſhed *pro hac vice*; but there is nothing in Law to prevent the King from preſenting in an extraordinary Caſe; 'tis a Prerogative which may conſiſt with the Liberty of the Subject, who upon the King's Preſentation upon a Promotion, may be as near to his Right to preſent upon a Vacancy as before, becauſe 'tis but an Exchange of one Life to another.

Chancel.

THIS is a Place ſeparated form the Body of the Church, by Lattices or Windows of Wood, which in *Latin* are called *Cancelli*, and from thence 'tis called a *Chancel*.

'Tis the Freehold of the (*m*) Rector, and part of his Glebe, and therefore he ought to repair it; but if the Rectory is impropriate, then the Impropriator may do it.

And this he is enjoyned to do, not only by the Common Law, but by the Canons of the Church; for in the Gloſs, upon the Conſtitution of Cardinal *Otthobon* 'tis ſaid, That *Chancels* muſt be repaired by thoſe who are thereunto obliged

(*m*) 2 Rol. Rep. 212

which

which Words must refer to the common Custom of (*n*) *England*, by which Rectors are obliged to repair the *Chancels*; and if Prohibitions should be granted in such Cases, Consultations are usually awarded, of which there are Forms in the * Register.

It hath been a Question, if an Impropriator should neglect to repair the *Chancel*, how he may be compelled to do it; and 'tis held, that the impropriate Rectory cannot be sequestred by the *Spiritual Court*, because by the Statute 31 *H.* 8. the Profits of such a Rectory are made a Lay Fee, and so not subject to the Jurisdiction of that Court, so that the Remedy must be against the Person himself, as against a Layman for not repairing the Church.

But notwithstanding 'tis the common Custom for the Rectors to repair, I do not deny, but in some particular places there may be an ancient Custom to the contrary; as for instance: There is such a Custom in *London* for the Parishioners, and not the Rector to repair the *Chancels*.

So likewise by (*o*) Prescription, a particular Man's Estate may be liable to repair it.

As to Seats in the *Chancel*, it hath been a Question, whether the Ordinary may place any Person there; the Objections against it are

(1.) Because 'tis the Freehold of the Rector.

(2.) Because he is to repair it.

But these are not sufficient reasons to divest the Ordinary of that Jurisdiction, for the Freehold of the Church is in the Parson, and yet the Bishop hath power of placing Persons there.

Then as to repairing, 'tis no more than what of common Right he ought to do, for he receives the Profits of the Church, and by the Canon *opus ibit cum emolumentis*; but 'tis otherwise at common Law; for if the Seat is not *in nave Ecclesiæ*, the Ordinary hath nothing to do with it.

Chancellor.

IN ancient Times Emperors and Kings had so great Esteem of the *Piety* of Bishops, that they gave them Jurisdiction in particular Causes, as in Marriages, Adultery, last Wills, *&c.* which were determined by them in their *Consistory Courts*.

(*n*) 2 Inst. 489. * 48. (*o*) 2 Vent. 35. 2 Vent. 239.

But

But when many Controverſies did ariſe in thoſe and other Caſes, it did not conſiſt with the Character of a Biſhop to interpoſe in every litigious Matter, neither could he diſpatch it himſelf, and therefore it was neceſſary for the Biſhop to depute ſome ſubordinate Officer, experienced both in the Civil and Canon Laws, to determine thoſe (*p*) Eccleſiaſtical Cauſes, and this was the original of *Dioceſan Chancellors*.

Under this Title I ſhall treat,

(1.) Of the Antiquity of a *Chancellor*, and how he muſt be qualified for the Office.

(2.) To whom it may be granted.

(3.) What Eſtate a *Chancellor* hath in this Office.

(1.) **The Antiquity of the Offices.**] Some have been of Opinion, that *Chancellors* were very late Officers, and introduced by the Sloth and Negligence of Biſhops, unwilling to hear and determine thoſe Cauſes in which they had a Juriſdiction.

But the Learned (*q*) Sir *Tho. Rydley* tells us this is a Miſtake; for in the firſt Ages of the Church, the Biſhops had thoſe Officers which were called *Eccleſiecdici*, that is Church Lawyers, who were bred up in the Knowledge of the Civil and Canon Laws, and their Buſineſs was to aſſiſt the Biſhop in his Juriſdiction throughout the whole Dioceſs; and becauſe the *Chancellor* doth the ſame thing now; therefore he concludes that the Office was the ſame with thoſe ancient Church-Laweyers.

But probably they were not Judges of *Eccleſiaſtical Courts*, as *Chancellors* are at this Day, but only adviſed and aſſiſted the Biſhops themſelves in giving Judgment, for we read of no *Chancellors* here in all the *Saxon* Reigns, nor after the Conqueſt, before the Time of *H.* 2. for that King requiring the Attendance of Biſhops, in his State Councils, and other publick Affairs, it was thought neceſſary to ſubſtitute *Chancellors* in their Room, to diſpatch thoſe Cauſes which were proper for his Juriſdiction.

Afterwards a *Chancellor* became ſuch a neceſſary Officer to the Biſhop, that he was not to be without him; for if he would have none, the Archbiſhop of the Province might enjoin him to depute one, and if he refus'd, the Archbiſhop might appoint one himſelf; becauſe 'tis preſumed, that a Biſhop alone cannot decide ſo many Spiritual Cauſes which ariſe within his Dioceſs.

(*p*) Sid. 88. 201. (*q*) View of Civil Law, Fo. 156.

The

The Perſon thus deputed by the Biſhop, hath his Authority from the Law, and his Juriſdiction is not like that of a Comiſſary, limited to a certain Place, and in certain Cauſes, but extends throughout the whole Dioceſs, and to all Eccleſiaſtical Matters; not only for Reformation of Manners, in Puniſhment of Criminals, but in in all Cauſes concerning Marriages, laſt Wills, Adminiſtrations, *&c.*

His Qualifications.] As to his Qualifications, neither a Layman, or married Perſon, could exerciſe this Office by the Canon Law, or any other Eccleſiaſtical Juriſdiction whatever; but after *H.* 8. *cap.* 17. had reaſſumed the Supremacy, a Law was made, by which *Doctors of the Civil Law*, whether married or not, might be made Chancellors, and ſit as Judges in Biſhops Courts.

'Tis true, this Law was repealed by a (*s*) Statute made 1 &2. *Ph. & M.*; but it was revived by 1 *Eliz.* 1.

By the Canons of King *James* no Man is to be admitted to be a (*t*) Chancellor, except he is learned in the Civil Law, and at leaſt a Maſter of Arts, or Batchelor at Law, and 26 Years Old.

It hath been a queſtion ſince the Statute 37 *Hen.* 8. and before that Canon, whether *a Batchelor at Law* was capable of being a *Chancellor or Commiſſary*, and it was adjudged that he was capable? For the (*u*) Statute is not reſtrictive to *Doctors of the Civil Law alone*; ſo that no other perſon might be a Chancellor.

The like point was adjudged ſince the (*x*) Canon, between *Walker* and Sir *John Lamb*; in which Caſe it was held that the Statute 37 *Hen.* 8. was an affirmate Law, and did not reſtrain the Office to a Doctor of Law.

If therefore the knowledge of the Civil Law qualifies a Man to be a Chancellor, then he who is not competenly Learned in that Law is not capable of that Office; and therefore Dr. *Sutton*, who was Chancellor to the Biſhop of *Glouceſter*, and who was only Rector of a Pariſh Church, and not inſtructed in the Civil or Canon Law, was deprived by the Eccleſiaſtical Commiſſioners for that very Reaſon, tho' it was objected that he had a (*z*) Patent from the Biſhop for his Office, which was confirmed by the Dean and Chapter; and ſo had a Freehold for his Life, which could not be determined by Eccleſiaſtical Commiſſioners:

(*t*) Canon 127. (*u*) Cro. Eliz. 314. (*x*) Cro. Car. 314. (*y*) Godb. 290. (*z*) 2 Roll. Abr. 286.

But this was denied by Juſtice *Doderidge*; for tho' the Office was granted for Life, yet the Officer having no Skill to Execute it, he had no Freehold in it; for his inſufficiency created an Original Incapacity, ſo as to make the Grant void *ab initio*.

It muſt be agreed, that the right which he had to receive the Profits was Temporal, but the Exerciſe of the Office was Spiritual; and therefore the Eccleſiaſtical Court is proper to determine whether the Perſon is ſufficiently qualified in point of Learning, in the Canon and Civil Laws, to Execute ſuch an Office or not; and ſhall not be Prohibited.

But if that Court will deprive a Perſon for matters cognizable at Law, then the Judges will Prohibit them.

The caſe of Dr. *Sutton* beforementioned, is the only caſe where a *Chancellor* hath been deprived by the Spiritual Court for inſufficiency. It was lately attempted upon a Libel againſt Dr. *Jones*, Chancellor of the Dioceſs of *Landaff*, for the like Reaſon, *viz.* for being unlearned in the Canon and Civil Law; but the Dr. had recourſe to the Temporal Courts for a (*a*) Prohibition, which was Granted, and he Declared upon it; but the Caſe was not Determined.

Whether it may be Granted to Two.] The next thing to be conſidered is, to whom it may be Granted, *viz.* Whether to *One or Two?* and as to that it hath been doubted whether a Judicial Office, as this, might be Granted to Two, becauſe they may differ in Judgment, which might be a delay to Juſtice; for one may Excommunicate, and the other Abſolve. But ſuch a Grant may be ſupported by uſage, that is, if the Office was granted to Two before the Statute (*b*) 1 *Eliz.* it may be granted ſo afterwards; for that provides, that *all lawful Grants made by Eccleſiaſtical Perſons, of any Office, in old time wont to be granted*, ſhall be good.

Anno 8 *Jac.* This very Office of Chancellor was granted to (*c*) Dr. *Trevor* and *Griffin*. And in the Caſe of Dr. *Jones*, it was granted to him and another; and there being ſeveral grants of the Office to Two ſince the Statute, it was an inducement to the Court to believe that it was granted ſo before.

What Eſtate he hath in the Office.] I ſhall in the next place conſider what Eſtate the Perſon hath in this Office; and this by the ancient Eccleſiaſtical Laws was not an Eſtate for Life: For a grant of Juriſdiction did ceaſe by the Death of the grantor, and there is a very good reaſon for it, *viz. né invitus habeat Officialem fortaſſis fili odioſum.*

(*a*) Mod. 27. (*b*) Cap. 4. (*c*) 2 Rol. Rep. 306. Cro. Car. 55.

This

This was the opinion of (*d*) Juſtice *Doderidge* in the Prebend of *Hatchetley*'s Caſe, *viz.* That ſuch a grant was not good but during the Life of the Biſhop, and ſhould not bind his Succeſſors; and my Lord *Coke* was of the ſame Opinion, *viz.* That it was very hard it ſhould not be in the power of the Succeſſor to remove him, but that he ſhould be bound to anſwer for the Acts of another who was never deputed by him.

But now the Patents for ſuch places are generally made for the Life of the Grantee, and by virtue of ſuch grant he is made the Judge of the *Conſiſtory Court*; and the legal Acts of that Court are reputed and taken as the Acts of the Biſhop himſelf, by whoſe Authority he ſits; for there lies no Appeal to him as the immediate Superior, but to the Archbiſhop of that Province.

The Canoniſts hold, that by a general Grant of this Office, nothing paſſes but a power or authority to hear Cauſes, and that the Biſhop by appointing a Chancellor doth not diveſt himſelf of any other Power, which he hath as ordinary, but he may delegate all or any part of it by ſpecial Commiſſion to others; for tho' by the Statute 37 *Hen.* 8. Doctors of Law are made capable of exerciſing all manner of Eccleſiaſtical Juriſdiction, yet the Biſhops from whom 'tis derived may limit and circumſcribe it to particular Acts and Caſes, but this is ſeldom done.

Laſtly, a Chancellor thus deputed may make a Leaſe of a (*e*) Rectory, which ſhall be good without the confirmation of the Dean and Chapter, for he is not *infra minores ordines qui famulantur Eccleſiæ.*

Chantrie.

THis was a little Chappel, or a particular Altar in a Cathedral Church, Built and Endowed for the Maintenance of a Prieſt to Sing Maſſes, which were held ſatisfactory to redeem the Soul of the Founder out of Purgatory; and from thoſe Prayers in this place it was called a *Chanterie*, and the Prieſt who officiated there was called a *Chantor* or Souls Prieſt.

There were many of thoſe in *England* before the Diſſolution; for any Man might Build a *Chanterie* without the leave of the Biſhop, and this was by the Authority of the Pope, for in thoſe places, and by thoſe Prieſts, the Doctrine of Purgatory was maintained; but in latter times none could build theſe *Chantries* without the King's Licence.

(*d*) Noy 152. (*e*) Sid. 158.

In

In the Reign of *Hen.* 8. when the belief of Purgatory began to decline, and the Trade of Redeeming Souls from thence decreaſed, it was thought an unneceſſary thing to continue the Penſions and Endowments of thoſe Prieſts; therefore *Anno* 37 *Hen.* 8. *cap.* 4. theſe *Chanteries* were given to the King, who had power at any time to iſſue Commiſſions to ſeize thoſe Endowments, and take them into his Poſſeſſion; but this being in the laſt year of his Reign, there were ſeveral of thoſe Endowments which were not ſeized by virtue of any ſuch Commiſſions: Therefore, *Anno* 1 *Edw.* 6. *cap.* 14. thoſe *Chantries* which were in being five years before the Seſſion of that Parliament, and not in the actual Poſſeſſion of *Hen.* 8. were adjudged to be, and were veſted in that King.

But becauſe many of thoſe *Chantries* were actually ſurrendred to *Hen.* 8. therefore there was a Clauſe in this laſt Statute to confirm ſuch ſurrenders, with a ſaving the right of others.

About Twenty Seven Years after this Statute of *Edw.* 6. a Man had a parcel of the poſſeſſions of a *Chantrie*, which he held by the payment of (*f*) Rent and Fealty; theſe Lands came to the King, who granted them to another: It was held that the Patentee ſhould enjoy it by virtue of the Grant, and ſhould pay the Rent to him who was Lord before, not as a Rent Service, but as a Rent Charge; for which he might Diſtrein of Common Right.

I ſhall mention ſuch Caſes which I find to have been adjudged upon this Statute; but firſt I muſt repeat the words of the Statute its ſelf.

All Chantries, and all Lands belonging to them, and given *and appointed to the finding a Prieſt, to* have continuance for Ever; *and alſo all Annual Rents imployed for the maintenance of any ſtipendiary Prieſt for ever, are veſted in the King.*

Now the word *given* beforementioned, doth not import an abſolute (*g*) Gift; for if Lands were given upon condition to find a Prieſt, *&c.* 'tis within this Statute: And ſo it is, tho' the gift is for Life, notwithſtanding the words of the Statute are, (*viz.*) *given to the finding a Prieſt for ever*; becauſe the chief intent of the Law-makers was to ſuppreſs all ſuch ſuperſtitious uſes.

If Land of the value of 20 *l. per Annum* was given to find a Prieſt, without mentioning how much of it ſhall be applied for his Maintenance, in ſuch Caſe the whole is veſted in the King by this Statute:

(*f*) 1 And. 45. (*g*) 4 Rep. 104.

other

So 'tis if by the Gift or the Will of the Donor, the Prieſt is limited to receive only 10 *l.* for his Maintenance, becauſe the other 10 *l.* ſhall be intended for the finding neceſſaries to carry on the Superſtition, as Veſtments, Books, *&c.*

But if the other 10 *l.* had been given to the Poor, that had been a good uſe; and in ſuch Caſe the King ſhould have but the 10 *l.* allowed to the Prieſt, as an annual Rent iſſuing out of the Land; for wherever there is a good uſe coupled with a bad one, the (*h*) King ſhall have no more but what is appointed for the Superſtitious uſe.

As for inſtance, where two Houſes *Anno* 6 *Hen.* 7. were deviſed for the (*i*) maintenance of an *Obit* at 3 *s.* 4 *d.* Annually, and the reſt of the profits to repair the Church; in ſuch Caſe the Queen ſhall not have the Houſes, but only ſo much as was appointed for maintaining the *Obit*, which was a Funeral Solemnity every Year, in comemoration of the Death of the Founder.

But in ſuch caſe ſome of the Profits muſt be imployed for that good purpoſe for which they were deſigned, and not all to the Superſtitious uſe; for if Lands of the yearly value of 9 *l.* 4 *s.* were given to find a Prieſt to pray for the Soul of the donor and to Sing an *Obit*, out of which he appointed that the Prieſt ſhould yearly receive 6 *l.* 13 *s.* 8 *d.* and for the *Obit* 13 *s.* 4 *d.* and the reſidue to repair the Church: Now, tho' the laſt was a good uſe, yet it was held that thoſe Lands were veſted in the King, becauſe the Superſtitious Uſes amounted to 7 *l.* 7 *s.* and there was a quit Rent of 2 *l.* 2 *s.* iſſuing out of the Land, and due to the King at the time of the Deviſe, both which amounted to more then the yearly value of the Land; ſo there could be nothing remaining for the (*k*) good uſe:

But where both thoſe uſes meet in one Gift, and it doth not appear how much ſhall be applied to each uſe there, the Queen ſhall have the whole, becauſe of the incertainty, which would have been otherwiſe if the certain quantity had been limited to each uſe; for then the (*l*) Queen ſhould have only ſo much as was implied to ſupport the Superſtitious uſe.

It muſt be likewiſe a *Chantrie* in Fact, and not in Reputation. For if the Lands are not given or implyed to Superſtitious purpoſes, but only reputed ſo, thoſe are not given to the Queen:

(*h*) Moor 692. (*i*) Cro. Eliz. 449. (*k*) Jones 387. Cro. Car. 455.
(*l*) Moor 189. 263.

As for Inſtance, a Man Deviſes 400 *l.* to the (*m*) Dean and Chapter of *York*, to find a *Chantrie* in their Church for ever, and an *Obit* every year for the Death of the Founder, and appointed how much the Prieſt ſhould have for his Maintenance.

The Dean and Chapter received the Money of the Executors of the Doner, and obliged themſelves *ac omnia bona ſua*, to perform his Will.

Afterwards they purchaſed Lands with this Money, and appointed a Stipend for the Prieſt, and another Sum for the *Obit*: Now tho' theſe Lands were purchaſed for this very purpoſe, yet this was held not to be a *Chantrie* by the Will of the Doner, becauſe the Money and not the Land was given; and the Dean and Chapter did not make it a *Chantrie*, becauſe they did not oblige their Lands, but their Goods, for the Payment of this yearly Penſion to the Prieſt.

Chaplein: { *See* { Plurality, Reſidence.

IN former Times when the Kings of *France* were engaged in Wars, they always carried St. *Martin's Cap* into the Field, which was kept in a Tent as a precious Relique, and from thence the Place was called *Capella*, and the Prieſts who had the Cuſtody of that Tent, were called *Capellani*; and from them thoſe who miniſter in ſacred Affairs, were afterwards called *Chapleins*.

Theſe Perſons amongſt us are only ſuch as officiate in the free *Chappels* of the Queen, or in private Oratories of Noblemen and others, who by the Statute 21 *H.* 8. *cap.* 13. have power to retain the Number following.

Almoner,	2	*Comptroller* of the *Houſhold*,	2
Arcchbiſhop,	8	*Dean* of the *Chappel*,	2
Baron,	3	*Duke*,	6
Barons Widow,	2	*Dutches*, being a Widow and tho' ſhe marries,	2
Biſhop,	6		
Chancellor,	3	*Earl*,	5
Chief Juſtice,	1	*Knight* of *Garter*,	3
Clerk of the *Cloſet*,	2	*Marques*,	5

(*m*) 2 Cro. 51.

His

His *Widow*, tho' ſhe Marry, that doth not take off the Qualification,	2	*Secretary* of *State*,	2
Maſter of *Rolls*,	2	*Treaſurer* of the *Houſhold*,	2
		Viſcount,	4
		Warden of *Cinque-Ports*.	1

NOTE, *That tho'* Widows *of* Dukes, Marqueſſes, Earls *and* Barons, *do Marry under that Degree, they may reteine Two* Chaplains, *which ſhall be qualified within this Law.*

Theſe Perſons thus reteined, have the Privilege to get a Diſpenſation to hold two Livings, and in ſuch Caſe, if they are legally inducted into a ſecond Living, tho' the Lord is afterwards attainted, or removed from his Office, they ſhall hold both during their Lives; but if attainted or diſplaced before the *Chaplein* is preferred to a ſecond Living, then the Qualification is gone.

Chappel.

THE Word is derived fron *Capella*, mentioned in the laſt Title, which was a little Tent, wherein Reliques were kept; but afterwards it was taken for every private *Chappel* or *Oritory*.

With us here in *England* there are ſeveral ſorts.

(1.) Parochial *Chappels*, and theſe differ only in Name, from Pariſh Churches, but they are ſmall, and the Inhabitants within the Diſtrict are few, in reſpect to larger Churches and Pariſhes; and formerly theſe were united to Churches.

(2.) *Chappels* which adjoin to, and are part of the Church, and thoſe are ſuch which were built by honourable Perſons for Buring Places for themſelves and Families.

(3.) *Chappels* of Eaſe, and thoſe are uſually built in very large Pariſhes, where all the People cannot come to the *Mother Church*; and in theſe *Chappels* the *Cure* is uſually ſerved either at the Charge of the Rector, or of ſuch, who by Cuſtom or Compoſition, are to provide a Miniſter to officiate there, but generally the Sacraments are to be adminiſtred in the Pariſh Church, and not in theſe *Chappels*.

'Tis true, in ſome particular Diſtricts, where there are ſuch *Chappels*, they may baptize and adminiſter the Sacraments, and may have *Chappel-Wardens*; but theſe *Chappels* are not exempt from the Viſitation of the Ordinary, nor thoſe who reſort thither from contributing to the *Repairs* of the *Mother Church*, eſpecially if they bury there; for tho' ſome part of the Pariſh have always repaired the *Chappel*, yet 'tis

ſtill the ſame Pariſh, and they are part thereof, and therefore of common (o) Right ought to contribute to the *Repairs* of the Church, and the rather, becauſe ſuch *Chappels* were built for their Eaſe, for they are obliged to go to the (p) *Mother Church*, but not to the *Chappel*; yet they may be diſcharged of this Duty by Preſcription, tho' 'tis againſt common Right; but then they muſt ſhew ſome ſpecial Cauſe, upon the very (q) Endowment it ſelf; for 'tis not ſufficient to alledge that time out of mind, they have repaired their own *Chappel*, and *by reaſon thereof* have been diſcharged towards the Repair of the Church, becauſe 'tis no direct Preſcription; but if they preſcribe generally to be diſcharged without ſhewing for what (r) Cauſe; or if they alledge that Time out of Mind, they have repaired part of the *Wall of the Church-yard*, and their own likewiſe; or ſhew any *modus* to pay a certain Sum yearly towards the Repairs of the *Mother Church*, ſuch a Proſcription is good.

(4.) Free *Chappels*; and theſe are ſuch which were founded by Kings of *England*; this appears by the Writs of Prohibition, when the Privileges of ſuch *Chappels* have been invaded by Abbots and others, for the Recital is (ſ) *Cum Eccleſia, &c. per progenitores, noſtros, quondum Reges Angliæ, fundata, &c. Capella Libera a primæva ſua fundatione fuerit*, where the Word *Libera* imports, that 'tis free from all Epiſcopal Juriſdiction, and only to be viſited by the (t) Founder and his Succeſſors, which is done by the Chancellor; but yet the Queen may Licenſe any Subject to build and endow a Chappel, and by Her Letters Patents exempt it from the Viſitation of the Ordinary.

(5.) *Chappels* in the Univerſities, belonging to particular Colleges, theſe are conſecrated, and Sacraments are adminiſtrsd there; but they are not liable to the Viſitation of the Biſhop, but of the Founder.

(6.) Domeſtick Chappels, which were built by Noblemen and others, for the private Service of God, in their Families, and theſe are not conſecrated, they may be built without the Leave of the Biſhop; but by the Canon Law, Chappels which had Pariſhes united to them, could not be built without his Conſent; and becauſe Domeſtick Chappels might, 'tis probable, for that reaſon, they are exempted from his Juriſdiction.

(o) 2 Rol. Abr. 289. (p) Hob. 66, 67. 1 Rol. Rep. 126. 2 Rol. Rep. 263.
(q) 2 Rol. Abr. 290. 2 Rol. Abr. 311. Contra. (r) 2 Rol. Abr. 290.
(ſ) Regiſt. 40, 41. (t) N. B. 42.

Church

Church.

I ſhall not treat of this Word in a *Theological Senſe*, as being a Congregation of People met together to worſhip the True God, and to partake of the Sacraments according to the Inſtitution of our Saviour; neither ſhall I treat of the *Rulers*, *Believers*, and *Catechumens*, which were the three Orders of Men of which the Church was at firſt compoſed, any farther than to tell the Reader, that the Rulers were the Biſhops; the Believers were thoſe which were baptized, and did partake of the *Communion*, and were therefore called *Illuminati*, becauſe their Underſtandings were ſuppoſed to be enlightned by the Knowledge of the true Religion.

The *Catechumens* were not admitted to the Privilege of Baptiſm, they were not ſo much as to ſtand in the Church when the Communion Service was began; they were not allowed to hear any Diſcourſes in the Church of the miſterious Points of Religion, but only ſuch which related to Morals, nor where they permitted to ſay the *Lord's Prayer*.

But to return. I ſhall treat of this Word, in a legal Senſe, relating only to the Place where this Worſhip is performed; and this I will do under theſe different Appellations,

(1.) *Cathedrals*, of which the Biſhop is Incumbent.

(2.) *Collegiate*, and theſe were Monaſteries of which Abbots and Priors were formerly the Heads,

(3.) *Parochial*, of which Rectors and Vicars are Incumbents.

As to the firſt of theſe, I find that when our *Saxon* Anceſtors were converted to *Chriſtianity*, they uſed ſuch *Britiſh Churches* which were then ſtanding, and thoſe were very few.

But *Ethelbert*, King of *Kent*, built Two, and by his Example other great Men were encouraged to do the like.

Bede, our firſt *Engliſh* (*u*) Hiſtorian, gives us an Account of two more which were built by Noblemen; and 'tis probable, he had not mentioned it if it had been a common thing to build Churches in thoſe Days, or if many had been then built; from which we may conclude, that the Work went on very ſlowly; for tho' the Piety of ſome Biſhops moved them to ſo good an Undertaking, and particularly *Birinus*, an *Italian*, who was ſent hither, by *Pope Honorius*, to preach the Goſpel, and who built a Church at *Dorcheſter* in *Oxfordſhire*; yet there were not Churches enough in the

(*u*) Lib. 5. cap. 4.

Nation to contain the Converts, for they uſually met in the Field, where they worſhiped publickly under an erected Croſs.

But in the Churches, thus built, the Biſhop and his Clergy lived in Common, whom he ſent out to particular places to preach the Goſpel, where he thought they might be moſt ſucceſsful; and theſe are the Churches we now call *Cathedrals*.

Theſe were dedicated to the Service of God in thoſe early Days, and were preſerved for that purpoſe, when the Abbies were demoliſhed, at the beginning of the *Reformation*, and now ſtand as the ſtately Monuments of the Piety of our Predeceſſors, affording a competent Maintenance to many ingenuous Perſons, who are well deſcended, and who have devoted themſelves to the Miniſtry of the Goſpel.

(2.) *Collegiate*; The State of an Ambulatory *Clergy*, being found to be inconvenient, and ſeveral Churches being built where Chriſtianity moſt prevailed; but ſtill, at ſome Diſtance from the *Cathedrals*, the Biſhop ſettled a competent Number of *Presbyters* there, which not long after were called *Collegiate Churches*, and theſe were liberally endowed by the great and pious Men of that Age.

(3.) *Parochial*; In ſucceding Ages when the Nation became populous, and many Villages were built, ſome of them more remote from the *Cathedrals*, the Biſhop gave Leave that *Churches* ſhould be built there, and transferred the Right of Baptiſm and Burial to them, which with the Right of Tythes made them *Parochial*; and not long after, Lords of Mannors built more Churches on their own Lands, for the greater conveniency of themſelves and their Tenants, and made Pariſhes of their own Demeſns, but this was not till the latter end of the *Saxon Reigns*; for *Bede*, who was a Monk himſelf, complained to *Egbert*, Archbiſhop of *York*, above Two hundred Years after the Converſion of the *Saxons*, that there was a great want of Parochial Settlements in his Days, which implies that there were ſome ſuch Settlements.

But when Churches were built, it was neceſſary to fix the Bounds within particular Diſtricts, that the People who reſided there, might know where to attend the Worſhip of God; and Laws were ſoon made by the conſent of the Biſhops, that the Lords of Mannors might retain a third part of the Tythes, ariſing yearly within their Mannors, from the common Treaſury of the Dioceſs, for the uſe of their Churches; and thus a parochial Right of Tythes became veſted in the Rectors of thoſe Churches; and when this

this began me, I ſhall acquaint the Reader under the Title *Pariſh.*

And here it may not be improper to mention the ancient Ceremonies, in conſecrating the Ground on which the Church was intended to be built, and of the Church it ſelf after it was built.

When the Materials were provided for building, the Biſhop came in his Robes to the Place, *&c.* and having prayed, he then perfumed the Ground with Incenſe, in a circular Motion, then the People ſung a Collect in praiſe of that Saint to whom the Church was to be dedicated; then the corner Stone was brought to the Biſhop, which he croſſed and laid for the Foundation.

After theſe Ceremonies one would think ſome ſtately Fabrick was to be erected; but the Churches were then ſo very mean, that when the Candles were ſet before the *Reliques*, they were often blown out by the Wind, thro' the Chinks and Thinneſs of the Walls; and it was upon this Occaſion that King *Alfred* invented *Lanthorns.*

But as mean as they were, thoſe Churches were always conſecrated, and a great Feaſt was made on that Day, or on the Saint's Day to which it was dedicated, but the Form of the Conſecration was left to the Diſcretion of the Biſhop.

There was one drawn up here in the Year 1661, but it was never authorized; and probably it was made, becauſe ſo great an Offence was taken at *Biſhop Lauds*, conſecrating St. *Katherine Creed Church* in *London*, which was thus:

He came on a *Sunday*, being the 16*th Day of* January, *Anno* 1630, to the *Weſt* Door of that Church; and ſome Perſons, who were prepared for that purpoſe, ſpoke aloud, theſe Words (*viz.*) *Open, open ye everlaſting Doors, that the King of Glory may enter in.*

Immediately the Doors were opened, and the Biſhop and ſome other Doctors entered; then he kneeled, and with Eyes lifted up, and his Arms ſpread, he pronounced the Place to be Holy, in the Name of the Father, *&c.*

Then he threw ſome of the Duſt of the Church into the Air, ſeveral times, as he approached the *Chancel*; and when he came to the Rails of the *Communion Table*, he bowed towards the it ſeveral times.

Then they all went round the Church repeating the hundred *Pſalm*, and afterwards a Form of Prayer, which concluded thus: (*viz.*) *We Conſecrate this Church, and ſet it apart to Thee, O Lord Chriſt, as Holy Ground, not to be prophaned any more to common Uſe.*

Returning to the *Communion Table*, he pronounced *Curſes* againſt thoſe who ſhould prophane that Place, and at every *Curſe* he bowed towards the *Eaſt*, and ſaid, Let all the People ſay, *Amen*.

Afterwards he pronounced *Bleſſings* on all thoſe who ſhould be Benefactors, and repeated, Let all the People ſay, *Amen*.

Then there was a *Sermon*, and after that the *Sacrament* was adminiſtred; and when he came near the *Altar*, he bowed ſeven times; and coming to the *Bread*, he gently lifted up the *Napkin*, which he laid down again, and withdrew, and bowed ſeveral times; then he uncovered the *Bread*, and bowed as before, the like he did with the Cover of the *Cup*, and ſo the Ceremony ended.

In the next Place I ſhall treat of,

(1.) *Rates* made to repair Churches.
(2.) Who are bound to repair, and who not.
(3.) Of Ornaments, who is to contribute to them, and who not.

Rates.] As for *Rates*, made either for repairing the Church, or fencing the Church-yard, they are to be made by the *Churchwardens*, who are to give a general Summons at the Church, that the People may meet at a certain (*x*) Time and Place for that purpoſe; and the Majority of thoſe who meet upon ſuch a Summons, ſhall conclude the whole (*y*) Pariſh; but if they all refuſe, or neglect to meet, then the *Churchwardens* alone may make the *Rate*.

If 'tis legally made, or impoſed by the Ordinary, without the conſent of the Pariſhioners, yet if they agree to it afterwards, it ſhall bind.

Now theſe *Rates* muſt be made upon the whole Pariſh, and not upon a particular Perſon, and if made to raiſe Money to repair the *Church*, tho' that Word may comprehend the *Chancel*; yet if the Money is laid out to repair the (*z*) *Chancel*, the Pariſh are not to allow it in the *Churchwardens* Accounts; but if 'tis expreſly made for the Repair of *both*, 'tis Illegal, and the *Temporal Courts* will prohibite any Proceedings to recover it.

If a *Rate* is made on Lands to repair the Church, and for making a new *Clock* and *Chimes*, and for dividing the Church-Houſe, and for relieving the Poor, 'tis too late to move for a Prohibition after Sentence in the *Spiritual Court*, and to ſug-

(*x*) Hetley 61. (*y*) 1 Vern. 367. (*z*) 1 Mod. 236.

geſt

geſt that ſeveral of theſe Matters are not cognizable in that Court.

When theſe Rates are made 'tis the proper Buſineſs of the Churchwardens to collect the Money, but by *Cuſtom* the Conſtable may be bound to do it, and therefore if a Libel is brought againſt him (*a*) for refuſing to collect it a Prohibition ſhall not go, becauſe the Spiritual Courts may try this *Cuſtom*.

Repairs.] Concerning Repairs I ſhall begin with the (*b*) Canon, which requires *every Perſon who hath Authority to hold Eccleſiaſtical Viſitations, to view the Churches within their Juriſdiction once in 3 Years, either in Perſon, or cauſe it to be done, and they are to certify the Defects to the Ordinary, and the Names of thoſe who ought to repair.*

Theſe Repairs muſt be done by the Churchwardens (*c*) at the Charge of the Pariſhioners, and the Eccleſiaſtical Judge may excommunicate any or all of them for any Neglect in not repairing.

It hath been a Queſtion whether this is a real Charge upon all the Lands in the Pariſh, or only upon the Perſons in reſpect of their Lands, (*d*) and the better Opinion is, That 'tis a Perſonal Charge by reaſon of the Lands, for where the Owner or Occupier refuſes or neglects to contribute to repair, *&c.* the Lands cannot be ſequeſtred, but the Perſons may be excommunicated, (*e*) for the Ordinary hath a Juriſdiction over them, but not over their Lands, he is not to meddle with the Poſſeſſions of Laymen, but to proceed againſt them by Eccleſiaſtical Cenſures.

However, 'tis ſuch a Charge on the Lands (*f*) that no Cuſtom can be good to diſcharge it, as if a Cuſtom is alledg'd that the Defendant ought not to be rated according to the Value of his Lands, but to the Value of his Sheep-Walks; this is a void Cuſtom.

If a Man live in one Pariſh, and hath Lands in another, which he keeps in his own Hands, he ſhall be charged to the *Repairs* of that Church where *his Lands are*, and not where he liveth, for tho' the Charge is upon the Perſon, yet 'tis in reſpect of his Lands, (*g*) and therefore as to this Purpoſe he is a Pariſhioner where the Lands are, and not where he lives.

If he let his Eſtate to a Tenant the Tax ſhall be ſet on the Farmer, becauſe it may not be known who is Landlord, but he is not to pay the whole, for he may plead in the Spiritual Court that he is only the Farmer, *&c.* and he is to pay no

(*a*) Hardres 510. (*b*) Canon 86. (*c*) 1 Mod. 236. (*d*) 2 Mod. 255. 2 Vent. 35. (*e*) 1 Mod. 194. (*f*) Hetley 131. 2 Rol. Rep. 463. (*g*) Cro. Eliz. 659. 843. 2 Roll. Abr. 289. 5 Rep. 66.

more than what the Land is worth above the Rent, (*b*) and the Landlord muſt pay according to the Rent reſerv'd.

If Lands lye in Two Pariſhes, (*i*) and the Owner is ſu'd to contribute to the Repairs of the Church in one of the Pariſhes for that part of his Lands which lyes in the other Pariſh, ſuggeſting a Cuſtom for it, which was deny'd by the Defendant, this Cuſtom ſhall be try'd at Law.

And when the Libel is for not repairing, *&c.* (*k*) 'tis not ſufficient for the Defendant to ſuggeſt, that other People have Lands in the ſame Pariſh which are not charged, for if 'tis true 'tis a good Allegation againſt the Libel in that Court, becauſe the Rate ought to be made upon the whole Pariſh, and 'tis a juſt Cauſe to appeal from a Sentence there, but not for a Prohibition.

Ornaments.] As to Ornaments the Charge is upon the Perſonal Eſtates of the Pariſhioners, (*l*) and not upon their Lands, and therefore if a Rate is made to charge the Lands a Prohibition will be granted.

Tis for this Reaſon that the Perſon muſt be charged where *he lives*, and not where his Lands are, (*m*) for if the Libel is for Ornaments, 'tis a good Plea to ſay, that he was not a Pariſhioner there at the time of the Rate made.

The Rate muſt be made upon all the Pariſhioners of Ability, and none are to be excus'd, and 'tis the Majority in this Caſe, as well as in the other, for Repairs of the Church, which conclude all the reſt, but then they muſt be aſſembled at a Veſtry after publick Notice; (*n*) therefore where a greater Part agreed to have a fifth Bell, and the leſs Number diſagreed, yet the whole Pariſh was concluded.

But tho' generally Lands ought not to be rated for Ornaments, yet by a ſpecial Cuſtom both Lands and Houſes may be liable to it, and ſo it was held *Hill. 9. Will. in B. R.* between *Hawkins* and *Rons*, *viz.* the Churchwardens of the Pariſh of St. *Edmond* on the Bridge in *Exceſter* libell'd againſt the Defendant, ſetting forth an ancient Cuſtom within the Pariſh, that they and their Predeceſſors had adorn'd the inſide of the Church at the publick Charge of the Owners and Occupiers of ancient Houſes within that Pariſh, by a Rate made by them, with the Conſent of the major part of the Pariſhioners, having reſpect to the annual Value of the ſaid Houſes; and this was held to be a good Cuſtom.

(*b*) 2 Roll. Rep. 270. (*i*) 2 Roll. Abr. 308. (*k*) Roll. Abr. 290. (*l*) 2 Roll. Abr. 291. 2 Roll. Rep. 262, 270. (*m*) 2 Roll. Rep. 262. (*n*) 2 Roll. Abr. 291.

In

In the next place I ſhall mention a few Things,

(1.) Concerning Ways leading to Churches.

(2.) Who are oblig'd by the Laws to come to Church.

(3.) What the Law is concerning quarrelling there.

(4.) How it protects the Perſons of thoſe who come thither.

(5.) And laſtly, I ſhall treat of the Union of Churches.

The Ways which lead to Churches are only private, becauſe they belong to the Inhabitants of particular Villages, and therefore if the Churchwardens libel for a Way for all the Pariſhioners, if the Defendant ſuggeſts that 'tis a *common High-way*, a Prohibition will be granted.

Any Pariſhioner may preſcribe to have a Way to the Church, (*o*) but in the Preſcription he muſt ſet forth what Way, *viz.* whether a Horſe or Foot Way, and from whence, and thro' what place it leads to the Church, and this will be a good Juſtification in an Action of Treſpaſs.

(2.) The Laws which are made to oblige People to come to Church are.

By the Statute, 1 *Eliz. Cap.* 2. every Perſon is to come to his Pariſh Church, (or upon Let thereof) to ſome other Church every *Sunday and Holiday*, upon Pain of the Cenſures of the Church, and likewiſe to forfeit 12 *d.* to be levy'd by the Churchwardens, for the Uſe of the Poor, by way of Diſtreſs.

And any Juſtice of the Peace of the Diviſion where the Offender liveth may ſend for him, (*p*) the Neglect being prov'd by one Witneſs upon Oath, and if he cannot give a ſatisfactory Excuſe, the Juſtice may direct a Warrant to the Churchwardens to levy that Penalty by Diſtreſs, and if that cannot be had then to commit him.

By another Act made *Anno* 23 *Eliz. Cap.* every Perſon not coming to Church, as enjoyn'd by the aforeſaid Act, 1 *Eliz.* being *convicted* thereof ſhall forfeit 20 *l. per Month* over and above the aforeſaid Forfeiture of 1 *s.* and if he forbear for 12 Months then the Biſhop of the Dioceſe, or Judge of Aſſize, or Juſtice of Peace of the County where the Offender lives, certifying it into *B. R.* he ſhall be bound with Two Sureties in 200 *l.* to be of the good Behaviour, and ſhall continue bound till he conform.

The Forfeiture is to be divided into 3 parts, to the Queen, to the Poor, and to the Proſecutor, and to be recover'd by Action of Debt, Bill, Plaint, or Information; and if the Party is not able to pay it he ſhall be committed till paid.

(*o*) 2 Roll. Abr. 287. (*p*) 3 Inſt. Cap. 4.

There

There is a Proviſo in this laſt Act, That if the Offender, either before he is indicted, or at his Arraignment or Trial, *before Judgment*, ſhall conform himſelf before the Biſhop of the Dioceſe where he ſhall be reſident, or before the Juſtices where he ſhall be indicted, arraigned or tried, (having not before made the like Submiſſion at any Trial) ſhall, upon his Recognition of ſuch Submiſſion in open Aſſizes or Seſſions of the County where ſuch Perſon ſhall be reſident, be diſcharg'd againſt all and every the ſaid Offences, and of all Pains and Forfeitures for the ſame.

There is likewiſe a Proviſo to the ſame Effect in the Statute, 1 *Jac. viz.* That if a *Recuſant* ſhall ſubmit and be obedient to the Laws of the Church, and continue there during the Time of Divine Service and Sermon, that he ſhall be diſcharg'd of the Penalties which he might ſuffer for Recuſancy ſo long only as he ſhall continue in Conformity.

Three Years after the making the Statute, 23 *Eliz.* an Action of Debt, *qui tam, &c.* was brought againſt *Thomas Wachell* for the 20 *l. per* Month, (*q*) there was a Verdict againſt him, and it was mov'd in Arreſt of Judgment that no Place was ſet forth where the Offence was committed, but the Exception was not allow'd becauſe the Action was grounded upon a *Nonfrazance*.

In Dr. *Foſter*'s Caſe, which was an Information upon this Statute, (*r*) it was objected that there muſt be a Conviction upon a former Proſecution before the Information could be brought, becauſe the Statute is, (*viz.*) that the Perſon *being convicted* ſhall forfeit, *&c.* but it was ruled that the Conviction might be upon one and the ſame Information.

If a Man is outlaw'd upon this Act, (*ſ*) he ſhall not be diſcharg'd upon Submiſſion and Conformity till the Outlawry is revers'd, or he is pardon'd.

But if not outlaw'd then Conformity before Judgment, either before the Ordinary, or in Seſſions, diſcharges the Penalties.

Therefore if *before a Verdict* (*t*) the Defendant comes into Court and ſubmits and acknowledges his Offence, and proves that he had conform'd ſince the Suit begun, by going to Church and receiving the Sacrament, *&c.* tho' a Verdict is afterwards given, this ſhall diſcharge the Penalties, becauſe the Conformity was *before the Trial*, beſides the Penalty acquires no Debt or Duty till Judgment.

(*q*) 1 And. 138. (*r*) 11 Rep. 60. 2 Bulſt. 325. 1 Roll. Rep. 25.
(*ſ*) 4 Leon. 54. (*t*) Raym. 469.

I ſhall only add, That the Proſecution upon theſe Acts muſt be within a Year and a Day after the Offence, but that by a Statute made 1. *Will.* neither of thoſe Laws are to extend to Proteſtant Diſſenters from the Church, ſubſcribing the Declaration mention'd in the Statute, 30 *Car.* 2. *Cap.* 1.

(3.) That due Reverence and Attention may be had in the publick Worſhip, all Quarrelling is prohibited, either in the Church or Churchyard; and if any one offend in ſuch Caſe the Ordinary, upon Proof of the Fact by Two Witneſſes, may ſuſpend him *ab ingreſſu Eccleſiæ.*

Striking or laying Hands on another there, (*u*) the Offender ſhall be *ipſo facto* excommunicated, but if 'tis with a Weapon, or if 'tis only drawn for that purpoſe, the Offender is to loſe one of his Ears; now tho' the Words *ipſo facto* take off the Formality of a Sentence of (*x*) Excommunication, yet before he is excommunicated he muſt be convicted at Law, and that muſt be tranſmitted to the Ordinary.

If a Man ſhould be indicted on this Statute it muſt not be (*y*) generally, but the Fact muſt be brought within the Letter of the Law, and therefore the Indictment muſt ſet forth with what Weapon the Perſon did (*z*) ſtrike, for 'tis not ſufficient to alledge, that *extraxit gladium* againſt another, *& ipſum percuſſit*, but it muſt be according as the Statute is penn'd, (*viz.*) *Extraxit gladium ad percutiend.* and that *malitioſe percuſſit*; for to ſet forth generally that he did ſtrike is not good; to ſtrike without a Weapon is Excommunication *ipſo facto*, as hath been obſerv'd, to ſtrike with a Weapon is the Loſs of one Ear, therefore where a Commitment was made by Juſtices of Peace for diſturbing a Miniſter *per apertum factum* the Priſoner was diſcharg'd, becauſe they ought to ſet forth the particular Fact.

(4.) And in order to protect thoſe who come to Church we have Laws (*a*) to ſecure their Perſons, *eundo, morando & redeundo*, to or from Divine Service, the Perſon offending may be excommunicated, and pay Coſts in the Spiritual Court, or may be indicted and fined in the Temporal Courts, but the Arreſt is good in Law.

But theſe Statutes relate only to Arreſts in Civil Actions, and do not extend to Arreſts for a Breach of the Peace, for that is at the Suit of the Queen.

(5.) I will conclude this Title with a few Obſervations concerning Union of Churches.

(*u*) 5 & 6 Ed. 6. Cap. 4. (*x*) 1 Vent. 146. (*y*) Cro. Car. 464. (*z*) Cro. Eliz. 231. 2 Leon. 188. Noy 171. (*a*) 50 Ed. 3. Cap. 5. 1 Ric. 2. Cap. 15.

Before

Before the Statute 37. *H.* 8. *Cap.* 21. Churches might be united by the Conſent of the Biſhop, Patrons and Incumbents, or at leaſt there were ſuch Unions before that Act, for otherwiſe there had been no occaſion to confirm them by that Statute.

There are ſeveral Reaſons given for theſe Unions, but the moſt material are, becauſe the Rector might have a better Maintenance, or becauſe the Churches are ſo near that one Incumbent may ſupply both, or becauſe of the Poverty of one of the Pariſhes.

But by the Statute before-mention'd one of the Churches muſt not be above the yearly Value of 6 *l.* in the Queen's Books, and not *above a Mile diſtant* from the other; and if in a *Corporation*, then no Union can be made without the Conſent of the Magiſtrates, declar'd in Writing under their common Seal.

And by the Statute 17 *Car.* 2. *Cap.* 3. the Biſhop of the Dioceſs, with the Conſent of theſe Magiſtrates, together with the Patron, may unite them.

But the Pariſhes are ſtill to be diſtinct as to Rates, Taxes and Parochial Rites, and diſtinct Churchwardens are to be choſen, ſo that the Union chiefly reſpects the Place where the Pariſhioners are to meet to worſhip, neither ſhall it be good until enter'd in the Biſhop's Regiſter, or if the Revenue of both exceed 100 *l. per Annum.*

This laſt Act doth remedy an Inconveniency which was before, for the Union, by virtue of the Statute 37 *H.* 8. could not be made but upon an Avoidance, or if the Church was full then not without the Conſent of the Incumbent, but by this Statute it may be made whether the Church is full or not, for if full then 'tis not to commence till after the Avoidance of one of the Churches, to which the other Incumbent is to ſucceed.

And by a ſubſequent Statute (*b*) 'tis enacted, That if one of the Churches ſhould be demoliſh'd, then as often as the other is out of repair or wants Ornaments, the Pariſhioners of the demoliſh'd Church muſt contribute towards the ſame in ſuch Proportion as the Ordinary, who made the Union, ſhall direct, and for want of ſuch Direction they ſhall contribute one third part towards the Charge.

Now where Two Churches were united (*c*) by virtue of that Statute 37 *H.* 8. upon the Suggeſtion that they were not diſtant above *One Mile*, and the Pariſhioners are ſu'd in the

(*b*) 4 & 5 Will. (*c*) 2 Roll. Abr. 293.

Spiritual

Spiritual Court for not coming to Church, they may have a Prohibition upon a Surmiſe that the Churches were more than a Mile apart.

Our Law in this Caſe is agreeable to the ancient Canons of the Church, which allow'd the Biſhop to unite Two ſmall Benefices, for the better Support and Maintenance of the Miniſter, but then it was to be under ſuch a Value, and the Union was not to be *ad vitam*, but ſo long only as the Biſhop ſhould think convenient to continue it.

And this appears where Pluralities were moſt ſtrictly prohibited, which was always upon this Condition, *ſi facultas ſuppetit*, which Words imply, That where there was an incompetent Maintenance a Man might have Two Livings, at a reaſonable diſtance, and with the Allowance of the Biſhop, and accordingly * *Balſamon* tells us, That in the *Greek* Church Pluralities are allow'd if the Benefices are near and under the ſame Biſhop.

Churchwardens.

THESE are very ancient Officers, and by the Common-Law are a Lay-Corporation, to take care of the Goods of the Church, to which they have a Right for the Benefit of the Pariſhioners.

Under this Title I ſhall mention,

(1.) By whom Churchwardens are to be choſen.

(2.) Of Preſentments made by them.

(3.) What Actions they may bring, and for what.

(4.) When and to whom they are to accompt.

(5.) Of Actions brought againſt them.

(1.) They are choſen every Year by the joynt Conſent of the Miniſter and the Pariſhioners, but if they cannot agree then the Miniſter ſhall chuſe one, and the Pariſhioners another, and this is by virtue of (*d*) the Canon.

But before the making this Canon the Pariſhioners in ſome Places choſe both the Churchwardens, and where that was us'd the Canon doth not abrogate the Cuſtom, and in ſuch (*e*) Caſe, if the Archdeacon ſhould refuſe to ſwear them, a *Mandamus* lyes, for every Pariſh had formerly a Right to chuſe their Churchwardens; but becauſe they vary'd in the manner of chuſing, therefore a Cuſtom might be alledg'd, and

* Addit. 2. No. 10. (*d*) Canon 89. (*e*) Jones 439. Cro. Car. 551. 389. 2 Roll. Abr. 4034. 287.

Iſſue

Iſſue might be taken at (*f*) Law to try whether a ſelect Veſtry or the whole Pariſh ought to chuſe.

In (*g*) *Carpenter*'s Caſe the *Mandamus* was directed to the Commiſſary to Swear two *Churchwardens*, who were choſen by the *Pariſhioners*, by vertue of a *Cuſtom* which the Rector denied, and inſiſted upon his Right, by vertue of a *Canon* to chooſe one; the Commiſſary made a ſpecial Return, which is ſet forth at Length in the Report; but a *Mandamus* was granted, for the *Eccleſiaſtical Court* cannot try the Cuſtom.

(2.) As at the common Law, the Enquiry is to be made by Juries, ſo by the *Eccleſiaſtical Laws* the Enquiry is to be made by Churchwardens, and this is the chief Deſign of Viſitations.

By the (*h*) *Canon* they are to make their Preſentments of ſuch things which are given in Charge at the Viſitation, but not oftner than once in a Year, where it hath been no oftner uſed; nor above twice in any Dioceſs whatſoever, except it is at the Biſhop's Viſitation.

But voluntary Preſentments of any notorious Offenders may be made oftener.

And this is not only to be done *ex Officio*, but they are obliged, by Oath, to make their Preſentments upon a Book of *Articles*, given to them in the Viſitation, and upon Refuſal to take the Oath, they may be excommunicated; but then if any of theſe Articles concern himſelf, he is not obliged to take ſuch Oath, but only to do what belongs to his Office; and if he ſhould be excommunicated in ſuch caſe, 'tis good Cauſe for Prohibition; and if he is not abſolved upon Requeſt, an Attachment lies.

The Preſentments which they make, muſt not be with a malicious Deſign to vex the People; for if ſo, then an Action on the Caſe lies againſt them; but if they have a Verdict, they ſhall not have double Coſts; tho' the (*i*) Statute expreſly provides, that they ſhall where the Action is brought againſt them, for any thing done by vertue of their Office, becauſe their Preſentments are meerly Eccleſiaſtical; and the (*k*) Law-makers never intended to give double Coſts, but where Officers were ſued for Temporal Matters, done by them in Execution of their Office.

The Books in the Margent warrant this Diſtinction, but 'tis a nice one; for the Churchwardens are not named in the Statute 7 *Jac.* which gives the double Coſt, but that Statute

(*f*) Hardres 379. (*g*) Raym. 439. (*h*) Canon 117. (*i*) 7 Jac. cap. 5. 21 Jac. cap. 12. (*k*) Cro. Car. 285. Jones 530.

being

being made perpetual by 21 *Jac.* the Churchwardens are *declared* to be within the Purview of the former Statute.

Now if Officers ſhall recover double Coſts, when ſued, for what they do only in temporal Matters, then this *Declaration* is almoſt in vain, becauſe the Office of a Churchwarden, eſpecially in making Preſentments, relates chiefly to ſuch Matters which concern a Spiritual Juriſdiction.

The Time of making theſe Preſentments is uſually at *Eaſter*; and theſe (*l*) Officers may be proſecuted in the *Spiritual Court* as perjured Perſons, if they willingly neglect or omit to make their Preſentment at that time.

What Actions they may have, and what not.] They may maintain an Action on the Caſe againſt him who ſhall *deface a* (*) *Monument* in the Church, or an Action of Account againſt their Predeceſſors for a *Bell*, or any Goods belonging to the Church, but then they muſt decclare *de bonis Parochianorum*, or an Action of Treſpaſs for any thing taken out of the Church which belonged to the Pariſhioners; and this the new Churchwardens may do, tho' the (*m*) Treſpaſs was done in the Time of their Predeceſſors; and a Releaſe by one is no Bar to the Action of the other, becauſe they have no proper (*n*) Intereſt in the things themſelves for which they ſue, but are only a ſpecial Corporation for the Benefit of the Church, and therefore they are always to conclude their Declaration *Ad dampnum parochianorum*, and not to their proper Damage.

But the Suits which they bring in the (*o*) *Spiritual Court* muſt not relate to any thing concerning the Inheritance; therefore if they Libel for a *Way* to the Church, or to repair the Fences of the Church-yard, by reaſon of Lands adjoining; or that the Defendant, and all thoſe whoſe Eſtate he hath in ſuch a Houſe, have uſed to find Bread and Bear for the Pariſhioners in their Perambulation; theſe are all Temporal Matters, and the Allowance of ſuch a Refreſhment is in Nature of a Corrody, for which an Aſſize will lie.

They cannot preſcribe to have Lands, neither can they have any Action of Treſpaſs at Common Law to recover Goods, of which they never were poſſeſſed; but by a Bill in Equity, they may have a Decree for ſuch Goods, and they may have an Appeal of Robbery, if Stolen.

If they are cited in the (*p*) *Eccleſiaſtical Court*, after they have given up their Accompts, and ſhould be excommunica-

(*l*) Can. 117. * Godb. 279. (*m*) Cro. Eliz. 145. 179. (*n*) 1 Rol. Rep. 426. 2 Rol. Abr. 306. 2 Cro. 234. (*o*) 2 Rol. Abr. 287. (*p*) Raym. 418.

ed, they may have an Action on the Case against the Prosecutor.

When, and to whom they are to accompt.] They are acountable to the Rector, Vicar, New Churchwardens and Parishioners, for what Goods and Money they have received for the Use of the Church, and this is to be done at the end of the Year; and what remains in their Hands, they are to deliver to the New Churchwardens, by a Writing indented; and if they refuse to give up ther Accompts within a Month after the New ones are chosen, they may be compelled by the *Ecclesiastical Court*, or may be presented at the next Visitation, or the New Churchwardens may have an Action against them at Law.

Of Actions brought against them.] They may be sued in the *Spiritual Court* for taking away any Goods of the Church, as *Bells*, *&c.* and in such Case the Court will decree the things to be returned *in* (q) *Specie*; but if the Suite is at Common Law, then Damages are to be recovered.

Anno 18. *Car.* 2. an (r) Indictment was brought against the Churchwardens of St. *Martin* in the *Fields*, for taking a Silver Cup, *Colore officii corrupte & extorsive*, and this was for placing a Man to be a Gallery-keeper in that Church, it was objected, that this was not an Office, but an Employment belonging the Churchwardens themselves, and they might depute any Man to assist them.

But the Words *corrupte & extorsive*, being in the Indictment, the Court would not quash it till that Fact was tried; and if it apppeared they held accounted to the Parish for the Cup, then it might be quashed.

Church-Yard.

THE Church-Yard is likewise the Freehold of the Parson, but 'tis the common Burial Place of the Dead, and for that reason 'tis to be fenced at the Charge of the Parishioners, unless there is a Custom to the contrary, or for a particular Person to to do it, in respect of his (s) Landsad joyning to the Church-yard, and tha[illegible] must be tried at Common Law.

But tho' the Freehold is in the Parson, he cannot cut down Trees growing there, except for the necessary Repairs of the

(q) Sid. 281, 288. (r) Sid. 307. (s) 2 Rol. Abr. 287.

(t) Chancel,

(t) Chancel, becauſe they are planted, and grow there for the Ornament and Shelter of the Church.

This is the ancient Common Law of this Kingdom, and therefore the Statute made *Anno* 35 *Ed.* 1. *Ne Rectores proſternant arbores in cæmiterio* is but declarative of that Law; and the Rectors, who cut down Trees for any other purpoſe, may be indicted upon that Statute, and fined, or may be proſecuted at Law; and the Courts at *Weſtminſter* have granted Prohibitions in ſuch Caſes, to ſtay any farther Waſt.

It hath been a (u) Queſtion where the Rectory is impropriate, and the Vicaridge endowed to whom the Trees in the Church-yard do belong; if to the *Vicar*, 'tis only becauſe he is to repair the Church; and if the Impropriator cut them down, and the *Vicar* Libels againſt him in the *Spiritual Court*, a Prohibition ſhall go; becauſe if he hath a Right to the Trees, he may bring an Action of Treſpaſs againſt the Impropriator for felling them.

Ciſtertians.

THESE were an Order of Monks, very much admired here for their Piety and Strictneſs of Life; for by this means, when they firſt came hither, which was ſoon after the Conqueſt, they ingratiated themſelves ſo much to the People, that they ſoon got Lands, upon which they wholly ſubſiſted, and paid Tythes out of theſe Lands to the Rectors of theſe Churches to whom due.

Afterwards having built Monaſteries, they diſliked Appropriations to them, calling it Sacriledge to take Tythes from the Secular Clergy; but by Degrees growing rich, and having founded Abbies in the Reigns of *H.* 1. and King *Stephen*, and other ſucceeding Kings, all which were well endowed, then their Zeal for the poor Clergy abated, and at laſt they got as large, and as many Priviledges to exempt their Lands from Payment of Tythes, as any Order whatſoever.

My (x) *Lord Coke* tells us, that at firſt moſt of the Orders of Monks were exempted from Payment of Tythes out of ſuch Lands which they held in their own Hands, but that Pope *Adrian* the 4*th.* reſtrained it to the *Ciſtertians*, *Templars* and *Hoſpitallers*; and this he tells us was in the Year 1150, which was towards the latter end of the Reign of King

(t) 1 Rol. Rep. 255. 235.
(x) 2 Inſt. 652, 2 Cro. 454.
(u) 1 Rol. Rep. 255. 2 Rol. Abr. 311. 337.

Stephen; and yet in the ſame Page he tells us, this Privilege was granted to thoſe Orders of Monks, by the *Council* of *Lateran*, which was not held till above ſixty Years afterwards, (*viz.*) 17 of our *King John*, *Anno* 1215; but *Biſhop* (*y*) *Stillingfleet* is certain that *Council* made no ſuch Decree.

Now this Reſtriction of *Adrian* was not narrow enough, becauſe it extended to all the Lands of thoſe Orders, which they had, or might hereafter have; and therefore Pope *Innocent* the 3*d*, many Years afterwards, reſtrained this Privilege to the Lands which theſe Orders *then* had, which was before the (*z*) *Lateran Council*; and this Decree of that Pope was received by the general Conſent of the Kingdom; and therefore this Priviledge was limited to thoſe Lands which thoſe Orders had before that *Council*, tho' 'tis generally held in our Books, that the *Ciſtertians* were diſcharged of Payment of Tythes, by the aforeſaid *Council*.

So that what Lands they had *after that Council*, could not be legally diſcharged, and therefore thoſe who claim any ſuch Privilege, ought to prove that they enjoyed the Land *before that Council*, and the Proof ought to be the ſtricter, becauſe 'tis a Privilege which they claim againſt common Right.

Now 'tis certain, that ſeveral Lands were given to this Order, ſince that Council, which if found out are not exempted at this Day; for tho' by the Staute of (*a*) Diſſolution, *&c.* all Lands were diſcharged, which were in the Hands of the Abbots at that time; yet this is no good Diſcharge, becauſe the Statute puts ſuch Lands only in the ſame legal Capacity to be diſcharged as they were in before; now if they were given ſince that Council, they were not in a legal Capacity to be diſcharged at all.

2. The Abbots and Convents of this Order had made real Compoſitions with the Rectors for Tythes due to them for their demiſne Lands, and this Prvilege of Exemption did not extend to ſuch Compoſitions.

In the Progreſs of a little more than 100 Years, theſe *Ciſtertians* pretended to ſo great Privileges, that they not only claimed to have their Lands diſcharged of Tythes, but from Taxes to the King, for they refuſed to contribute to the publick Levies in the Time of *King John*, who, *Anno* 11. of his Reign, was engaged in Wars with the *Iriſh* and *Welch*; and this made that King exact from that Order 33000 Marks, a great Sum in thoſe Days; and not contented with this, he confiſcated all their Goods, and would not ſuffer them to hold any Chapter till the Money was paid.

(*y*) Still. Eccleſ. Caſes, 213. (*z*) Hardres 101. (*a*) 31 H. 8.

This

This brought them into ſo mean a Condition, that they depended upon other Orders of Monks for their Subſiſtance.

But about thirty Years afterwards, they ſo well recovered this Loſs, that *H.* 3. deſired the Archbiſhop of *York* to ask them for a Year's Profit of their Wooll.

They deſired to be excuſed, however the Archbiſhop preſſed it ſo much, alledging that the King was always willing to help them in their Neceſſities; and enforcing his Requeſt with other Arguments, that an Abbot of that Order replied, the King was ſworn to do Juſtice, and that whilſt he governed according to Law, and committed no Oppreſſion, they would give him any thing for the Health of his Soul, and the Good of the Kingdom.

But ſtill they refuſed to contribute to the Support of the Government; and not only ſo, but they oppoſed the Pope himſelf; for *Gregory* the 10*th* having given Leave to *Otto* his Legate, to receive Procurarions from the Order, (*indulgentia conceſſa eidem ordini non obſtante*) the Legate exacted Money of them, inſtead of Procurations, which in thoſe Days were to be paid in Victuals; but they pretended to have Bulls of Exemption, from Payment of all manner of Procurations, and therefore they withſtood the Legate's Demands; and the Pope, to ſoften the Matter, commanded him, that in his Viſitation he ſhould be contented, *cibis regularibus abſque uſu carnium*, and not to take any Money; and this (*b*) Mr. *Prynn* tells us was the firſt *non obſtante* which was oppoſed in *England*.

But theſe Monks were not contented that the Lands which they poſſeſſed themſelves ſhould be diſcharged of Tythes; for they attempted to get the Pope's Grant, to exempt the Lands which they had Lett to Farmers from Payment of Tythes; and this would certainly have impoveriſhed the poor ſecular Clergy, to whom ſuch Tythes were due.

Therefore, *Anno* 2 *H.* 4. *cap.* 4. the Parliament being acquainted with this Matter, a Law was made, prohibiting the *Ciſtertians*, and all other Orders of Monks, to procure Bulls for ſuch Diſcharges, under the (*c*) Penalty of a *Premunire*, that is, to forfeit his Goods, and the Profits of his Lands during Life; and to be alſo impriſoned during Life.

But 'tis agreed on all Sides, that they were diſcharged from Payment of Tythes, for Lands which they poſſeſſed them-

(*b*) Prynn on the 4th Inſtitut. 109. (*c*) Burnet's Hiſt. Reform. 1 Pt. 108, 109. Dugg. 234.

ſelves, *before the Lateran Council*; and that by (*d*) 2 *H.* 4. their Farmers and Tenants ought to pay Tythes: Now if an Abbot and Convent of this Order had made a Leaſe of their Lands before the Diſſolution, *&c.* and afterwards that Leaſe had expired, and the Grantee of the King had kept the Lands in his own Poſſeſſion, they ſhould ſo long be diſcharged of Tythes; tho' by the Statute of (*e*) Diſſolution, the King was to have the Lands in the ſame manner as the Governours held them, which at that time payed Tythes, becauſe they were then Let to Farm.

It hath been a Queſtion, what Lands ſhall be ſaid to be *in Poſſeſſion* of this Order; as for inſtance: If Cattle are agiſted on their Lands, whether this can be properly ſaid to be (*f*) *inproprils manibus*, and 'tis held it cannot; for the Profits, which is the Herbage, are not taken by the Owner of the Soil, but by Cattle; and therefore the Owner of the Cattle, or of the Soil, muſt pay Tythes, but rather the Owner of the Cattle.

But this, and all other Orders of Monks, being long ſince deſolved, or ſurrendered to the Crown, I ſhall no longer inſiſt upon any Matters relating to them, but ſhall refer my Reader to the Title (Monks) herein after mentioned, where he will find, that all the ancient Abbies were of the Order of St. *Benedict*; that *Glaſſenbury* Abby in *Somerſetſhire*, was the firſt which was founded in *England*, of above 200*l. per Annum*, of which Order there were 52 Abbies and Priories of above that Value, at the Time of the Diſſolution; and that the *Ciſtertians* encreaſed faſter than the *Benedictines*; for in a little more than the compaſs of one Age, there were 37 Abbies, and other religious Houſes of that Order, of above the yearly Value of Two hundred Pounds.

Citation.

THIS is a Precept under the Seal of the Eccleſiaſtical Judge commanding the Perſon, againſt whom the Complaint is made to appear before him, on a certain Day, and at a certain Place therein mentioned, to anſwer the Complainant in ſuch a Cauſe, *&c.* and 'tis required by the (*h*) *Canon*, that the Name of the Party ſhall be expreſſed in

(*d*) Dyer 277, 278. (*e*) 31 H. 8. cap. 13. (*f*) Hardres 184.
(*h*) Canon 120.

the

the *Citation*, and that the Hand and Seal of the Judge ſhall be affixed to it.

The Archbiſhop of *Canterbury* had ſuch a Tranſcendent Power and Juriſdiction here, that he could cite any Man to the *Court* of *Arches*, out of the remoteſt part of the Kingdom, and this he could do for any trifling Cauſe, as for Defamation, *&c.* and upon any frivolous Pretence for not paying Tythes, and the Apparator making Oath, that the Party was duly cited, and not appearing, he was excommunicated, and could not be abſolved without paying the Fees of the Court, and of the Apparator, which was uſually two Pence *per* Mile.

This was found to be a great Oppreſſion, and therefore by the Statute 23 *H.* 8. *cap.* 9. it was provided, that for the Eaſe of the Subject, no Perſon ſhould be cited to appear out of the Dioceſs, or peculiar Juriſdiction where he liveth, under Penalty of double Damages to the Party grieved, to be recovered by Action, *&c.* and alſo ten Pound to the Queen and Proſecutor; but there is a Clauſe which excepts,

(1.) For ſome Spiritual Offence committed, or omitted, or done in the Dioceſs, to which the Party ſhall be cited.

Except { (2.) Or upon an Appeal where the Party ſhall find himſelf agrieved by the Ordinary.
(3.) Or where the Judge either dares not, or will not cite the Party.

(4.) Or unleſs the Judge is Party to the Suit.

(5.) Or at the Inſtance of an Inferior Judge to a Superior, in Caſes where the Canon Law, or Civil Law allow it.

My *Lord Coke* tells us this Statute is but declaratory of the ancient Canons of the Church; and that 'tis particularly explained by the 94*th* Canon of *King James*, (*viz.*) that the Dean of the Arches ſhall not cite any Perſon who doth not dwell in the particular Dioceſs, or peculiar of the Archbiſhop, for any Eccleſiaſtical Matter, without the Leave of the Dioceſan, except in thoſe particular Caſes above-mentioned, for the Archbiſhop, before the Reformation had not a concurrent Juriſdiction in every Dioceſs of his Province, but only as he was the Pope's Legate, and therefore the *Judge of the Audience*, who kept Court in *Southwark*; part of which is in the Dioceſs of *Winton*, and cited Perſons thither from the furtheſt part of *Hampſhire*, and excommunicated them if they did not appear, and would not abſolve them unleſs

they ſubmitted to have their Cauſes determined in the *Arches*; this was held contrary to the Statute.

As to the laſt of theſe Exceptions, (*viz.*) that a Man may be cited out of his Dioceſs at the Inſtance of an Inferior Judge to a Superior, *where the Law allows it*; theſe Words are reſtrictive, and therefore all Cauſes may not be tranſmitted to a Superior Judge, as where a Chancellor of an inferior Dioceſs tranſmitted a Cauſe to the *Arches*, becauſe it was ſo difficult, that the Plaintiff could not have Council in the Country; this was held an inſufficient (*i*) Cauſe.

And it hath been a Queſtion, whether a Chancellor can tranſmit Cauſes to the *Arches*, becauſe 'tis ſtill to a delegated Juriſdiction; therefore ſome are of Opinion, it ought to be from one Ordinary to another.

But 'tis agreed, that where a Peculiar is Subordinate to a Biſhop, there the Cauſe muſt be tranſmitted to him, and not to the Archbiſhop; unleſs the Peculiar is exempt from all ordinary Juriſdiction, and then it muſt be to the (*k*) Queen.

And when a Cauſe is thus tranſmitted, 'tis ſufficient that it appear ſo upon a Motion, for it need not be * pleaded, tho' formerly it was held † otherwiſe.

And as a Man who lives in a Peculiar, may be cited by the Ordinary of that (*l*) Dioceſs where the Peculiar is ſo; if that Peculiar hath a Juriſdiction by Preſcription, exempt from the Power of the Ordinary, then the Perſon muſt not be cited out of it.

I grant, the Dean of the *Arches* hath a Juriſdiction throughout the whole Province of *Canterbury* upon an Appeal brought; but he cannot cite one to the Court, who doth not dwell in the particular Dioceſs, or Peculiar of the Archbiſhop, without the Leave of the proper Dioceſan firſt obtained, except in the Caſes above-mentioned; and yet that Court ſhall be preferred before any other *Spiritual Court*; for if there are two (*m*) Executers, and one lives within the Juriſdiction of the *Arches*, and the other not; and if a Suit is brought againſt them, it ſhall be in the *Arches*, otherwiſe there would be a Failure of Juſtice; for one Executor cannot be ſued without the other.

But a Man may be cited to the *Arches* who lives in the Dioceſs in *London*; and this by vertue of a Compoſition be-

(*i*) Hob 185. 180. (*k*) Hob. 16. 186. (*l*) 2 Rol. Rep 448. Sid. 90. * 1 Levintz. 186. † Latch (*m*) 1 Rol. Rep. 328.

tween,

tween the (n) Archbiſhop and that Biſhop, and 'tis for this Reaſon that the Archbiſhop never viſits that Dioceſs.

'Tis true, this was always denied by Juſtice *Twiſden*, who held that ſuch a Compoſition was taken away by the (o) Statute, and that the agreement between the Ordinaries could not prejudice the People, for whoſe Eaſe and Benefit that Law was made.

But tho' it was made for their (p) Eaſe, they muſt take Advantage of it in proper time; for if a Man, who lives in an inferior Dioceſs, is cited to the Prerogative Court for a Legacy, (the Will being proved there) and if the Sentence is for the Legacy, and that Sentence is confirmed upon an Appeal to the Delegates, then 'tis too late for a Prohibition upon a Suggeſtion, that the Party was cited out of the County where he lived, becauſe he had owned the Juriſdiction throughout the whole Courſe of the Proceedings.

If a Man comes into a Place to (q) Trade, tho' he is not properly an Inhabitant there; yet he may be cited to the Archdeacon's Court of that Dioceſs, for any Spiritual Offence by him committed there, tho' he inhabits elſewhere, for otherwiſe he might offend in one County, and remove to another, and ſo go unpuniſhed.

And becauſe no Perſon ſhould be cited into ſeveral Courts for one and the ſame Offence, therefore 'tis provided by the (r) Canon, that where the Biſhop and Archdeacon do either by Cuſtom or Preſcription, viſit at ſeveral times in the ſame Year; that in ſuch caſe the Archdeacon do under his Hand and Seal, and within one Month after his Viſitation, certifie to the Biſhop, or his Chancellor, all ſuch Preſentments as were then made; and that the Chancellor do, within the like time after the Biſhop's Viſitation, certifie to the Archdeacon all Preſentments made in the *Epiſcopal Viſitation*; and the Penalty for not certifying, or for intermedling in each other's Viſitation, is Suſpenſion from exerciſing Juriſdiction, until he pay the Coſts and Expences to the Party grieved by ſuch Vexation.

(o) Cro. Car. 339, 340. Hardres 379, 380. (p) Raym. 92. (p) Cro Car. 97. (q) Hardres 421. (r) Canon 121.

Clergy.

THIS Word is derived from the *Greek* Word *Cleros*, which ſignifies a *Portion*; for the Men of this Order are, or ſhould be, in a peculiar Senſe, the Portion of the Lord.

In the Eccleſiaſtical Notion of the Word, it ſignifies the whole *Clergy*; but in the Legal Senſe of it, 'tis diſtinguiſhed from the Prelates, and ſignifies only the inferior *Clergy*.

Rigaltius in his Obſervations upon St. *Cyprian*'s Epiſtles, and our Mr. *Silden* tells, There was no Diſtinction in the Primitive Chriſtian Church, between the *Clergy* and the *Laity*, but this muſt be a Miſtake; for tho' all Chriſtians are God's Portion and Inheritance, yet thoſe who are ſet a-part for his Service, are in a more peculiar manner his Portion; for we ſee, that under the *Moſaical Diſpenſation*, the Prieſts, the Levites, and the Laymen, had diſtinct Offices appropriated to them.

'Tis true, at firſt all the Diſciples of Chriſt had a Commiſſion to Teach and Baptize all Nations, and this was in order to convert the *Pagan* World; but when many Converts were made, there was a Neceſſity to form them into regular Societies; and there was the like Neceſſity to have Rulers and Governours in ſuch Societies, without which it was impoſſible they ſhould ſubſiſt.

All the Superior Orders of Men in the Church were antiently called *Clerici*, but afterwards the Word was appropriated to Inferiors. 'Tis true, in the firſt Ages of Chriſtianity ſome were diſtinguiſhed by the Name of *Presbyters*, who were Men ordained to particular Offices in the Church; not by reaſon of their Age, as the Word it ſelf reports, but by reaſon of their Qualification; theſe were ſettled in the Church, by the Apoſtles themſelves, with Power to Preach, and to Adminiſter the Sacraments; they ſate on each ſide of the Biſhop, in his Cathedral, and were his ſtanding Council, with whom he adviſed in all difficult Affairs of the Church.

But I ſhall not enlarge on the Word, my Intention being to treat of the Clergy, as they are a divided Eſtate of the Realm from the Laity, both as to their Perſons and Eſtates, which they enjoy in Right of the Church.

And firſt as to their Eſtates: They have certain Privileges which the Laity have not; as for inſtance: They are diſcharged from Purveiance, they are not to ſerve in any Temporal Office againſt their Will; and therefore where a Clergyman

gyman was made *Expenditor* by Commiſſioners of Sewers, he had his Writ of Privilege for *vir militans Deo non implicetur ſecularibus negotiis*, ſo is the *Regiſter*, and ſo likewiſe is the antient Law of this (*ſ*) Realm, *Quod Clerici non ponantur in officia.*

They pay no Toll for Goods they have in Right of the Church, they are diſcharged from Pontage and Murage; but this is by the common Law, which has been altered by ſeveral Statutes, and particularly in this Caſe; for tho' it hath been held that they are not comprehended under the *general Words* of the (*t*) Statute, for repairing Bridges, which enacts, that decayed Bridges ſhall be repaired by the *Inhabitants.*

So by the Statute 13 *Eliz.* the *People dwelling* in a Hundred where a Robbery is comited, muſt produce the Felon: So by the (*u*) Statute 2 & 3 *Ph. & Maria*, every *Houſholder* is to work on the Highways; and by another (*x*) Statute, *all Reſciants* in the County ſhall be charged towards the building a common Goal; yet by the latter Judgments and Authorities in Law, they are made liable to all publick Charges impoſed *upon the People in general*, by Act of (*y*) Parliament, if not exempted by Name, and particularly for mending the Highways.

Then as to their Perſons, in an Action of Accompt, the Sheriff cannot have a *Capias* to take the Body, but he muſt return *quod clericus eſt beneficiatus nullum habens laicum feodum*; but in ſuch caſe he ſhall have a Writ to the Biſhop to ſummon him to appear.

His Body cannot be taken in Execution upon a Recognizance on a Statute Staple, for he is exempted by the very Writ, *viz.* (*z*) *Si laicus capias*, which implies, that if he is not a Layman, he muſt not take him.

So a Fine levied of his Spiritual Poſſeſſions ſhall not bar his Succeſſors, becauſe the Statute 13 *Eliz.* makes all (*a*) *Eſtates ſuffered* by them void, and by Fine and Nonclaim, an Eſtate is *ſuffered* to paſs.

Now as the Law hath taken care to protect their Eſtates and Perſons in the Caſes before-mentioned, and to ſecure a Maintenance for them without their Care or Labour, this ſhould not make them remiſs in the Cure of Souls, but rather encourage them in the diligent and conſcientious Diſ-

(*ſ*) 1 Vent. 105. (*t*) 22 H. 8. cap. 5. (*u*) cap. 8. (*x*) 18 H. 8. cap. 2. (*y*) 1 Vent. 278. 1 Lev. 139. (*z*) 2 Inſt. 4. (*a*) 11 Rep. 66. 1 Rol. Rep. 171. idem.

charge

charge of their Duty, which they ought to perform, if for nothing elſe; yet as a grateful Retribution to the State for ſuch Laws, by which they have a conſtant and ſettled Reward for their Labours.

It cannot be denied, but that ſuch Laws are very juſt and equitable; for 'tis reaſonable, that whilſt the Clergy, by a diligent Application to their Duty, are endeavouring the Service of God and the Church, they ſhould be ſecured in all the neceſſary Conveniencies of this Life, eſpecially ſince by this means the People are prepared for a better.

This is the greateſt End and Deſign of their Miniſtry, but yet they are not altogether forbiden the Intermedling in ſecular Affairs, either by the Apoſtolical Canons, or by any other Canons of the Church; for *Zonaras*, who wrote a Comment on the firſt, allows Clergymen to be Guardians to Infants; and 'tis certainly a ſecular Employment to diſpoſe their Eſtates to the beſt Advantage.

'Tis true, (*b*) St. *Cyprian* tells us, That Churchmen employing themſelves in ſecular Affairs have brought down many Perſecutions amongſt Chriſtians; and he was ſo very angry with *Fauſtinus*, a *Presbyter* of the Church of *Carthage*, becauſe *Geminius Victor* had made him Executor of his Will, that he ſuſpended him from his Monthly Allowance, and would not ſuffer any Prayers to be made in the Church in his Name; and yet I do not find that *Fauſtinus* either deſired, or took upon him the Executorſhip.

But becauſe the Church was then perſecuted, and in a time when there were ſo many Diviſions amongſt the Churchmen, that there were ſcarce enough to perform the daily Offices, therefore St. *Cyprian* was the more diſpleaſed at this Action, that he might diſcourage other Men from giving the *Presbyters* of his Church any manner of Opportunity to withdraw themſelves from their Duty there.

Beſides it was his Opinion, that St. *Paul* had eſtabliſhed a perpetual Rule againſt the worldly Employment of Churchmen; for ſpeaking of them he tells us, That *no Man who wareth entangleth himſelf with the Cares of this Life.*

Paulus Samoſetanus was the firſt Churchman of Note, who was employed in ſecular Affairs, but when the Empire became Chriſtian, 'tis reaſonable to imagine, that Churchmen were in great Favour with Princes, and conſtantly in their Courts, where they had ſecular Employments conferred upon them, as the Rewards for their care in converting Infi-

(*b*) Cyprian Epiſtle.

dels;

dels; but this was afterwards prohibited by Canons, and condemned by Imperial, Provincial, and Legantine Conſtitutions.

I grant they might be *Arbitrators* amongſt the People; and (c) St. *Paul* himſelf did not intend to exclude the *Clergy* from this Office, when he adviſed his *Corinthians* to refer their Differences to their Brethren; but the reaſon was, becauſe they ſhould not proſecute one another at Law in the Courts of Heathens, which Reaſon ceaſed when the Judges in the Temporal Courts became Chriſtians.

'Tis true, from the *19th Canon* made in the Council of *Eliberis*, by which 'tis ordered, that *Presbyters* ſhall not *leave the Places in which they ſerved* to follow Merchandize, it may be inferred, that they might Merchandize there, while they miniſtred, for that they might do for their neceſſary Maintenance, and ſupply the Cure beſides.

And this is agreeable with our Law, for tho' by the Statute 21 *H.* 8. *cap.* 13. Spiritual Perſons are forbidden to farm any Lands either by themſelves, or by any other Perſon to their Uſe, under the Penalty of Ten Pound *per* Month to the Queen and the Informer, or to buy any Cattel, or Merchandize to ſell again for Profit, under Penalty of treble the Value, to be divided as aforeſaid; yet the ſame Law allows, that if they have not ſufficient Glebe or Demeſne Lands in right of the Church, they may farm more for maintaining their Families, and may buy Cattel to manure it.

'Tis to be obſerved, that the Clergy, ſince the Reformation, have been ſo conformable to this Law, that we read of but one Proſecution againſt any of them upon this Statute, and that was ſix Years after it was made, an Action of Debt was brought againſt a *Vicar*, for farming Lands contrary to this Statute, who pleaded *non habuit ſeu tenuit terras*, &c. *ad firmam contra formam Statuti*; and upon this Iſſue it was held, that he might give in Evidence he took Lands for the Maintenance of his Family.

Upon the whole Matter, ſince the Clergy are an Order of Men ſet apart to attend the Service of Religion, 'tis neceſſary they ſhould have a ſettled and ſufficient Maintenance to ſubſiſt, that they might not be diverted from their Duty by ſeeking their Living from ſuch Advantages as might accrue by Bargains, Contracts, or any manner of Secular Employment; but yet they are not altogether prohibited in ſuch Caſes, but only from ſuch Buſineſs which might be an Avocation from their Miniſterial Duties.

(c) 2 Corinth. vi.

And

And as this might be done for their Support, ſo the State in thoſe Days was not depriv'd of their Service, eſpecially of thoſe who by natural or acquir'd Abilities were prepar'd for it, for as ſoon as ever our *Saxon* Anceſtors were converted to Chriſtianity the Clergy were call'd to their publick Councils, and their Advice was taken in the greateſt Affairs of the Nation, for we read in thoſe Days that *Tam Clerus quam Populus* were ſummon'd to the great Councils, by the firſt of which Words the inferior Clergy as well as the Prelates, and by the laſt the Nobility as well as the Commons were comprehended.

And 'tis evident that the inferior Clergy of every Dioceſs ſent Two Proxies of their Body to Parliament, who ſate and voted with the Commons in one Houſe till the Reign of *Ed.* 3. and thoſe who ſent Proctors were at the Expence of their Attendance there, as the Counties were at the Expence of their Knights, for when the *Abbot of Leiceſter*, who was ſummon'd to Parliament *Anno* 26 *Ed.* 3. had petition'd to be excus'd, becauſe he held no Lands by any other Tenure than *Frank-almoigne*, this Petition could not be allow'd, unleſs he had agreed to contribute to the uſual Charge of ſending Proctors to Parliament.

And it farther appears by the Queen's Writs of ſummoning the Prelates to Parliament that there is a Clauſe to warn the *Deans* and *Archdeacons to appear in Perſon*, and the Chapter and Clergy, by their Proctors, *ad conſentiendum*, to ſuch Acts as ſhall be made by the Common-Council of the Kingdom, which Form is us'd at this Day, tho' the inferior Clergy thus ſummon'd have not ſate in Parliament for ſome Ages.

However, it ſeems paſt doubt that they had ſate there, for in the Convocation which met *Anno* 1 *Ed.* 6. the Lower Houſe petition'd the Biſhops that ſome of the inferior Clergy might be re-admitted in the Houſe of Commons, according to the ancient Cuſtom of the Nation, and according to the Tenor of the King's Writ to the Biſhops.

The ſame thing was mov'd again about the latter End of *Queen Eliz.* Reign, and a Paper was deliver'd to her ſetting forth, That it did not appear by any Hiſtory or Record how they came to be excluded the Houſe, but it was thought it might be either by ſome angry King or ambitious Prelate.

'Tis true my *Lord of Sarum* is not ſatisfy'd in theſe Particulars, but makes it a Doubt whether the Clergy were ever in Poſſeſſion of any Right to be choſen Members of Parliament by virtue of the Præmonitory Clauſe in the Writ of Summons.

But

But the learned Dr. *Atterbury* hath prov'd them to ſend Members to Parliament in the ſtricteſt Senſe, and there is Reaſon to believe that they ſate there after the Reign of *Ed.* 3. for the *Duke of Glouceſter* having obtain'd an Act *Anno* 11 *R.* 2. by which he had the Government both of the King and the Realm, that Act was repeal'd *Anno* 21 *R.* 2. at the Petition of the Commons, and by the Aſſent of the Lords Spiritual and Temporal and *Proctors of the Clergy*, which were certainly part of that Parliament.

'Tis objected againſt this Opinion; That 'tis improbable the inferior Clergy ſhould be part of that Parliament, ſince they were never mention'd before or ſince to have any Share in the Legiſlative Power, and therefore ſome imagine thoſe Proctors of the Clergy were the Lower Houſe of Convocation, which ſate with the Lords and (*d*) Commons till they ſate apart, and then the Clergy ſate in Two Houſes, (*viz.*) the Biſhops in the Houſe of Lords, as Barons by Tenure, and the inferior Clergy in Convocation.

But the aforeſaid learned (*e*) *Doctor* hath given us Inſtances of theſe Proctors of the Clergy ſent to Parliament from the 22 *Ed.* 1. to 19 *H.* 7. but withal he tells us, That ſome Time after the Conqueſt it was thought more regular and agreeable to the Canons that the inferior Clergy ſhould attend the Parliament, not in one Body, as they did thro' all the *Saxon* Reigns to the Time of *H.* 3. but in Two Provincial Synods, and that accordingly they had ſo attended for near 400 Years, which ſeems to contradict what he alledg'd before, for we never read that they attended in ſuch Synods as a ſeparate Body, and at the ſame time were repreſented in Parliament by their Proctors, as Members thereof.

Thoſe who cannot deny that the Proctors of the Clergy have ſate in Parliament have diſputed what Power they had when met there, and particularly my Lord *Coke* (*f*) was of Opinion that they had no Votes, if ſo they could not be Members, but only Aſſiſtants to Biſhops.

But this could never be, for then they ſhould have ſate in the Houſe of Peers, beſides the Clauſe in the very Writ of Summons intimates that they were part of the Parliament, as hath been obſerv'd before, and if a part of Parliament they had certainly a Right to vote, or elſe they had been (as ſome will have them) a very inſignificant part; it likewiſe appears by the Petition before-mention'd that they had ſuch a Right, for otherwiſe there had been no occaſion of a Petition to be reſtor'd to it.

(*d*) B. H. R. 2 Pl. 49. (*e*) Atterb. Append. 566. (*f*) 4 Inſt. 3. 4.

But

But be it as it will, the inferior Clergy were by degrees admitted into Provincial Synods, which at first consisted only of Bishops and Abbots, and now these Clergy are an essential part of the Convocation, for they have a Right to be summon'd thither, and when met they have the Freedom and Liberty of voting in any Debates which may arise concerning the Doctrine or the Government of the Church.

At first they usually sate with the Bishops in one House, and sometimes they retir'd by themselves, the better to form and collect the Debates upon any important Occasions, and to report their Resolutions therein.

But in the Reign of *H.* 4. they divided from the Bishops, and sate in a distinct House by themselves, but did not chuse a Prolocutor in many Years after, for we read that the famous Canonist *Lindwood* was the first *Prolocutor Cleri*, and he liv'd in the Reign of *H.* 7.

Having given the Reader an Account of the Word Clergy, and of the Privileges and Maintenance which they enjoy by Law, that they might with more Freedom attend the Service of God and his People, and therefore that they ought not to undertake any Secular Business by which they may be diverted from a Work so great and necessary, tho' formerly they attended the publick Councils of Kings, and were Members of Parliaments here, and when excluded from thence were admitted inPto rovincial Synods, and are now an essential part of our Convocation, I shall in the last place mention what sort of Persons the Clergy are requir'd to be in respect to their Behaviour; and I find by the * Canon that they are to be sober in their Conversation, that they should not resort to Taverns or Alehouses, or play at Cards or Dice; and this is not only prohibited by that Canon, but by the Apostolical Canons, (*viz.*) that they should not frequent publick Houses, nor play at Dice, and by the Council of *Eliberis* 'tis Excommunication to do either; and *Justinian* forbids (*g*) Clergymen not only playing, but being present at it; this was likewise forbidden in the old Articles of Visitation here, and in several Diocesan Synods; the Punishment by our Canons is by Ecclesiastical Censures, according to the Quality of the Offence.

---

* Canon 75. (*g*) Spelm. Council 2 Vol. 182, 252, 295, 367, 450.

Clerk

Clerk of a Pariſh.

THE *Biſhop of Worceſter* tells us, that the Rectors of thoſe Churches which were very well endow'd could the better maintain inferior Clerks, who might be aſſiſtant to them in the publick Service of the Church, and this was the true Original of Pariſh-Clerks, who were at firſt intended as Aſſiſtants to the Incumbents, and therefore were uſually choſen by them.

They were call'd *Clerks* tho' not in Holy Orders, and their Buſineſs at firſt was to officiate at the Altar, and to ſay Maſſes for the Dead, and they had a competent Maintenance for this Service by the Offerings made at thoſe Altars where they officiated, for in thoſe Days there were ſeveral Altars in one Church.

Since the Reformation there is but one in a Pariſh, who, by the * Canon, is to be choſen by the Miniſter, and this is to be ſignify'd by him on the next Sunday to the Pariſhioners.

The Perſon thus choſen muſt be Twenty Years of Age, and one who can write and read, and alſo he muſt have a competent Skill in Singing, and ſuch Clerks ſhall receive the uſual Wages, for which they have Remedy in the Spiritual Court, but if they ſue there for a certain (*h*) Quantity of Bread due to them by Cuſtom from every Pariſhioner at *Chriſtmas* a Prohibition ſhall go.

But where there is a Cuſtom (*i*) for the Pariſhioners to chuſe a Clerk 'tis good, and the Canon cannot abrogate ſuch Cuſtom, and in ſuch Caſe he may have a *Mandamus* to the Archdeacon to ſwear him, and if a Suit ſhould be in the Spiritual Court to remove him, and to put in another choſen by the Parſon a * Prohibition ſhall go.

Collation.

THIS is where a Biſhop giveth a Benefice which he hath either as Patron, or which came to him by Lapſe; in the firſt Caſe he collates *jure pleno*; and ſome have been of Opinion, that in the other Caſe he collates *jure devoluto*, but that is a Miſtake; for of common Right Churches are under the immediate Care of the Biſhop; and the Right of Preſen-

---

* Can. 91. (*h*) 2 Rol. Abr. 286. (*i*) Cro. Car. 589. 2 Rol. Rep. 73. 481. 670. 2 Rol. Abr. 234. 2 Cro. 670. * Rol. Abr. 286.

tation was only indulged to the Laity, to encourage them to build and endow more.

Now if the Patron neglects to preſent, then this Right returns to the Biſhop in whom it was originally before the Patron could pretend to it.

'Tis true, if the Biſhop ſhould neglect to collate within ſix Months after the Lapſe, then the Archbiſhop hath a Right to do it, and this is properly *jure devoluto*, becauſe he doth not collate as Ordinary, but as Superior, in whom a Power is veſted to ſupply the Neglects of all Biſhops within his Province; and if he ſhould neglect, then it devolves to the Queen, who hath the Supreme Power to reform all the Defects of Government in any of Her Subjects.

And as a Biſhop may neglect to collate, ſo it may happen, that he may collate without a Title; but this wrongful Collation doth not put the true Patron out of Poſſeſſion, for he may preſent his *Clerk*, tho' the Collatee of the Biſhop is inſtituted and inducted.

And in this reſpect Collation differs from a Preſentation, for if a Patron, who hath no Right preſents, and his Clerk is inſtituted and inducted, and hath quiet Poſſeſſion for ſix Months, this is an *Uſurpation*; and the true Patron ſhall never preſent again, till he hath recovered his Rigt by a Writ of Right of Advowſon; but if a Biſhop collates without a Title, that doth not make an *Uſurpation* either againſt the Queen, or a common Perſon, for he is bound to recieive either of their *Clerks* when preſented; and if he refuſeth a *Quere impedit* lies againſt him, and the Reaſon is, becauſe this Collation ſhall be intended only as a (*k*) proviſional Incumbency, that Divine Service may be performed till the true Patron preſents.

Yet in the Caſe of Coparceners of an Advowſon, where the *Clerk* of one of them is deprived, if the Biſhop collate without giving Notice of the Deprivation to the other, and the Collatee dieth incumbent, this wrongful Collation ſhall be a ſerving his Turn, becauſe it was good againſt all but the true Patron; and he having neglected to remove that Incumbent, and ſuffering him to die in Poſſeſſion, that Neglect ſhall not turn to the Prejudice of the other Coparcener.

But when once the (*l*) Biſhop hath a Title to collate by Lapſe, if the true Patron ſhould preſent his *Clerk* before the Collatee is inducted, the Biſhop is not bound to receive him; but if the Archbiſhop ſhould collate within the Biſhop's ſix

(*k*) 1 Inſt. 344. b. (*l*) 2 Rol. Abr. 367.

Months;

Months; and the Patron in ſuch Caſe, ſhould preſent his Clerk to the Biſhop, he is bound to receive him, becauſe the Archbiſhop had wrongfully collated before his time.

So where the Biſhop had ſuch a Title to collate, and neglects to do it, within ſix Months after the Lapſe, but afterwards collates *within* the Archbiſhop's ſix Months, this ſhall be a Plenarty againſt the right Patron, and ſhall hinder him from preſenting, becauſe the Biſhop had once a Right to collate, and the *Uſurpation* is not between him and the Patron, but between him and the *(m)* Metropolitan.

It hath been a Queſtion, how theſe ſix Months ſhall be computed, (*viz.*) whether according to Twenty eight Days, or (*n*) *Kalendar* Months; and the better Opinion is, that where the Title accrues to the Biſhop, to collate upon a Deprivation, he hath ſix *Kalendar* Months after the Patron's Neglect.

Commendam.

THIS is a Diſpenſation from the Supreme Power, to hold, or take an Eccleſiaſtical Living, *Contra jus poſitivum*; and according to the *Canoniſts*, this may be done upon a double Account.

In utilitatem { *Eccleſiæ* & *Commendatorii.*

That which was for the Benefit of the Church is called *Semeſtris.*

That which is for the Benefit of the Party was Twofold.

Retinere & *Capere* { And that was *intermedia.* / And that was *Perpetua.*

The *Commenda ſemeſtris* was without any reſpect to the Benefit of the Comendatory, for it was only a Proviſional Act of the Ordinary, or of the Chapter, *Sede vacante*, in granting the Profits to a Parſon to ſupply the Cure for ſix Months, in which time the Patron was to preſent his Clerk; and this my (*o*) *Lord Hobert* tells us, did ariſe out of a natural Equity, that the Church ſhould not be without a *Paſtor*, during that time.

Now all Diſpenſations beyond the ſix Months, were only permiſſive at firſt, and granted to Perſons of Merit, but ſuch were granted here long before the Conqueſt; for *Oſwald*, who

(*m*) 2 Rol. Abr. 361. (*n*) 2 Cro. 141. 166. (*o*) Hob. 144.

was Archbiſhop of *York* in the Reign of King *Edgar*, held the Biſhoprick of *Worceſter* in *Commendam*; and probably the reaſon of ſuch *Commendams* may be thus:

Before there was any Diviſion of Pariſhes, the Biſhopricks of this Nation were liberally endowed, and the Revenues of the Church were brought into the common Treaſury, which was always in the *Cathedral* where the Biſhop preſided; and theſe Revenues were diſtributed by him amongſt his *Presbyters* or *Clergy*, as he thought convenient, reſerving a competent Share for himſelf.

Afterwards when the Nation was divided into Pariſhes, and particular Diſtricts were allotted to Rectors, the Biſhops parted with a Share to thoſe Rectors, and by this means their Revenues were conſiderably abated, ſo that the *Pope* thought it neceſſary to grant Diſpenſations *in Commendam*, for the better Support of the Honour and Dignity of the Biſhop.

And by this the Patron had no Injury, becauſe the Right of Patronage, at firſt, was a Conceſſion from the Church; and it ſeemed reaſonable that the *Pope*, who at that Time was the Head of the Church, might in Caſes of Neceſſity, grant ſuch Diſpenſations for a Time.

But this was an Uſurpation upon the *Crown*, for tho' by the *Lateran Council* Pluralities were condemned, yet the King might grant Diſpenſations in *Commendam*, to hold ſeveral Benefices together, and this he might do at Common Law; therefore the Statute 25 *H.* 8. which takes away that Uſurpation, doth reveſt that Right in the Crown.

2. There is a *Commenda intermedia*, and that is betwen a *Commenda Semeſtris*, and for Life; and 'tis *Retinere*, the Benefice for one or more Years, which is the Queen's Diſpenſation to prevent an Avoidance when She promotes the Incumbent to be a Biſhop.

This *Commenda Retinere* muſt always be before Conſecration, for afterwards it comes too late, becauſe the Benefice is then abſolutely void; and therefore it was held, that *Cardinal Beaufort*'s Diſpenſation *Retinere*, the Biſhoprick of *Winton* was void, becauſe it came after he was made a *Cardinal*.

But *Cardinal Wolſey*'s Diſpenſation *Retinere*, the Archbiſhoprick of *York* was Good, becauſe it was before he was made a *Cardinal*.

Such a Diſpenſation, before Conſecration, was always allowed to the *Pope* before the Reformation, it was the Eccleſiaſtical Law of the Land at that time; and by the Statute 25 *H.* 8. *cap.* 21. the Archbiſhop may now diſpence as the *Pope*

Pope did before; but ſuch Diſpenſation muſt be confirmed by the Queen.

This *Commenda intermedia* is ſometimes for three or ſix Years; thus (*q*) *Parkhurſt*, Rector of *Cleve* in *Glouceſterſhire*, being made Biſhop of *Norwich*, obtained a Diſpenſation, *Anno* 7 *Eliz.* to hold his Rectory for three Years.

So (*r*) Doctor *Thornbury*, Dean of *York*, being made an *Iriſh* Biſhop, *Anno* 36 *Eliz.* got a Diſpenſation *Retinere*, his Deanry in *Commendam*, and Doctor *Milbourn*, Rector of *Sevennoke*, being made Biſhop of St. *David*, *Anno* 4 *Jac.* had a Diſpenſation *Retinere*, his ſaid Rectory in *Commendam* for a Year.

So *Anno* 22 *Jac.* in the Caſe between (*ſ*) *Woodley* and the Biſhop of *Exon*, *&c.* the Incumbent obtained a Diſpenſation, to hold his Benefice in *Devonſhire* for ſix Years in *Commendam*, being made a Biſhop in *Ireland*.

And in a late Caſe, (*t*) Doctor *Tenniſon*, the preſent Archbiſhop of *Canterbury*, being Rector of a new Pariſh, made by Act of *Parliament*, and being afterwards made *Biſhop of Lincoln*, obtained a Diſpenſation *Retinere*, his ſaid Rectory in *Commendam* for ſeven Months.

It hath been objected in ſome of theſe Caſes, that when an Incumbent is made a Biſhop, a *Commenda Retinere* for Months or Years, tho' granted before Conſecration, is a void Diſpenſation; becauſe upon the very Promotion, his Benefice is void by the Common Law; and all the Title which he hath to it, is by this *Commenda Retinere*, which cannot be for Years, becauſe an Incumbency is a Freehold which muſt be for Life, and cannot be diminiſhed in point of Eſtate; beſides 'tis always obtained by an Inſtitution and Induction; and as the Nature of a Freehold could not be altered by the *Pope*'s Diſpenſation, before the Statute 25 *H.* 8. ſo it cannot now be altered by the Queen.

The Anſwer to this Objection is, That a Rector of a Church, who hath a Diſpenſation to hold it *before* he is conſecrated Biſhop, doth, by vertue of that Diſpenſation, continue Incumbent *after* his Conſecration; for if the Patron ſhould preſent, ſuppoſing the Church to be void, and his Clerk ſhould be inſtituted and inducted, yet a *Writ of Spoliation* lies againſt him by that very Incumbent who is made a Biſhop; which Writ no Man can have, but he who is a perfect Incumbent.

(*q*) Dyer 233, adjudg. 164. (*r*) Hatch. 31. Jones 158. (*ſ*) 2 Cro. 691. (*t*) Caſes

'Tis for this reaſon, that if a Biſhop hath a Diſpenſation (*u*) *Retinere*, his former Benefice *in Commendam* for three Years, and he reſigns it within that time, the Patron ſhall preſent, and not the Queen, becauſe the Avoidance is not by Ceſſion, but by Reſignation.

So it is if the Diſpenſation had been *Retinere* his Benefice for Life, the Patron ſhall preſent after the Death of the Biſhop; by both which Caſes it plainly appears, that the Biſhop ſtill continues Incumbent on his firſt Benefice, for otherwiſe the Avoidance would be by Ceſſion.

So a (*x*) Commendatory Dean may confirm a Leaſe, which he could not do if he did not ſtill continue Dean.

And as to a Temporary Incumbency, without Inſtitution, it may be altogether as good as in the Caſe of an Appropriation, by which the Church is given for ever, *Abſque aliqua Preſentatione inductione, ſive Admiſſione alicujus Incumbentis ad eandem*; by which Words 'tis allowed, that the perpetual Incumbency paſſeth without Inſtitution.

And if a *Commenda Retinere* for a few Years is granted by the ſame Power, there can be no reaſon given, but it muſt be as good in Law.

But we have Inſtances of ſuch Diſpenſations *in perpetuum*, and they ſtand upon the ſame reaſon with Appropriations, which were the ancient Endowments of ſome Biſhopricks, as the Rectories of *Eaſtmean*, and *Hambleton* in *Hampſhire*, are appropriated *ad menſam* of the Biſhop of *Winton*.

Then as to a Freehold, 'tis true, the Nature of it cannot be altered by a Diſpenſation; but certainly the Profits of the Church may be lawfully aſſigned for a Term of Years, and that is the Caſe of a *Commenda Retinere*, which in Truth is not properly a *Commenda*, becauſe a Man cannot be commended to that which is his own, 'tis rather a legal Aſſignment of the Profits for a certain Term of Years, or Time to a particular Perſon, and for a certain Purpoſe.

Beſides 'tis very reaſonable, that a *Commendam Retinere* for Years ſhould be good, becauſe ſuch a Diſpenſation doth not alter the Eſtate which the Incumbent had before, but continues it in him.

'Tis true, if the Property of a Living is changed, and a new Right obtained either by Inſtitution or Induction upon a Preſentation, or by a Grant of an Appropriation; in ſuch Caſes the Limitation for Years cannot abridge the legal Eſtate; for notwithſtanding ſuch Reſtriction, the Preſentee,

(*u*) Dyer 228. (*x*) Jones 158. Latch. 31.

or

or Grantee, may enjoy it during Life, and the reaſon is, becauſe 'tis againſt the Nature of ſuch Acts to be temporary, they muſt enure, and be perfect as they may be, that is, for Life, or forever: 'Tis likewiſe a Confirmation for a Year, which muſt enure forever, becauſe 'tis againſt the Nature of ſuch a Deed to abridge the Eſtate confirmed.

A *Commenda* is likewiſe *perpetua*, that is for Life of the Incumbent; and the ſame Objection may be made againſt ſuch a Diſpenſation, (*viz.*) that the paſtoral Care is not committed by Inſtitution and Induction, according to the Forms preſcribed by Law, but theſe Diſpenſations are allowed to be good.

The *Canoniſts* allow, that Neceſſity is the moſt reaſonable Ground for ſuch *Commendams*; which if true, then 'tis certainly a good Argument for ſuch Diſpenſations here, becauſe we have ſome very ſmall Biſhopricks; and there ſeems to be an abſolute Neceſſity of ſupporting their Dignity by this means.

The next is a Diſpenſation *Capere in Commendam*, and this differs from *Retinere*, for that is only to hold what was his own before, but this to take what belongeth to another.

And this ſeems to be injurious to the (*y*) Patron, and void even by the Canon-Law without his Conſent, becauſe it deprives him of the Benefit of Preſentation, which a Diſpenſation *in Commendam Retinere* doth not, for the Avoidance is by the Act of the Queen; and 'tis more reaſonable, that Her Authority ſhould extend to continue the Perſon promoted in the ſame Benefice he had before, than to give him any Power to take a new one.

'Tis true, during the time of ſuch Incumbency, there is *damnum*, but 'tis *abſque injuria* to the Patron; for it can be no Prejudice to him, that he hath preſented a Clerk, who was worthy to be made a Biſhop, and to whom the Queen had granted a Diſpenſation, notwithſtanding his Promotion, to continue Incumbent in the ſame Benefice during his Life, or for a ſhorter time, if She thinks fit; and when that is determined, or the Perſon dies, then the Patron hath power to preſent again.

There have been ſome Diſpenſations of this Nature, as in the (*z*) Biſhop of *Oſſory*'s Caſe, who had a Faculty *Perpetuæ Commendæ titulo adipiſci occupare & Retinere, unum vel plura Beneficia, curata vel non curata, ſui vel alieni juris Patronatus,*

(*y*) 2 And. 184. (*z*) Davis 68.

then vacant, or which ſhould afterwards be ſo, not exceeding the yearly Value of 40*l.*

At the time of this Grant, there was a Vicaridge in his Dioceſs which was full, and about five Years afterwards the Vicar died, and the Biſhop collated himſelf to it by Lapſe.

It was objected againſt the Legallity of that Diſpenſation, that the King could not make ſuch a Grant, becauſe the *Pope* could not do it before the Statute; for if a Layman was Patron, then it was not good without his Conſent; and if a ſpiritual Perſon was Patron, there was always in ſuch Grants a *Non obſtante* of his Right of Patronage, and a particular Clauſe to the Archdeacon, to put the Commendatory in Poſſeſſion of the Benefice *Cum accidcrit*, all which was omitted in that Grant.

But it was agreed, that a *Capere in Commendam* might be good, where the Right of the Patron was not prejudiced, as if he ſuffer a Lapſe.

In *Colt* and *Glover*'s Caſe the Diſpenſation was *Retinere in Commandam* one Benefice which the Incumbent had before he was conſecrated (*a*) *Biſhop of Litchfield*; and *Capere in Commendam propria authoritate unum aliud vel plura*, that is, as many as he could get with Cure, or without, provided they did not exceed the yearly Value of 200 Marks, and to enjoy the ſame ſo long as he ſhould live, and be Biſhop of that See.

Juſtice Dodridge held this *Commendam* to be illegal, becauſe it was *Capre pluria Beneficia*, without any Limitation either of the Number or Value, which muſt be a Miſtake, for it was reſtrained to the yearly Value of 200 Marks.

My *Lord Hobert*, in his Argument on the ſame Caſe, condemns this conditional *Commendam*, (viz.) *ſo long as the Commendatory ſhould continue Biſhop of that See*, becauſe the Incumbency ought to be for Life, and could not be deminiſhed; he allowed it might be good in the *Retinere* for a Term of Years, but not in the *Capere* without the Patron's Conſent; and the reaſon may be, becauſe in the one Caſe an Avoidance is prevented by ſuch a Diſpenſation, but in the other the Church muſt be abſolutely void; and therefore a *Commendum Catere* a void Benefice, deprives the Patron of one Turn at leaſt.

In theſe two laſt Caſes, all the moſt material Objections againſt theſe Diſpenſations are made and anſwered.

(1.) That a Biſhop cannot be Incumbent of a Living in his own Dioceſs, becauſe he is Sovereign there, and cannot be

(*a*) Hob. 140. Moor 898.

at

at the ſame time Subject; that the Office of a Biſhop and Vicar are incompatible, and cannot conſiſt in one Perſon.

'Tis true, when a Perſon is a Subject, 'tis a Contradiction to ſay he is not; but ſuch Subjection may ceaſe when the Vicaridge is in the Biſhop himſelf, as a Deputation ceaſes when the principal Officer executes the Office himſelf.

Neither is the Office of a Biſhop and a Parſon inconſiſtent in one and the ſame Perſon, for the Biſhop hath the *Cure* of Souls throughout the whole Dioceſs; and tho' the Parſon hath that *Cure* in a particular Pariſh, yet 'tis not excluſive of the Biſhop, becauſe he hath a general Charge over the Whole.

(2.) There is another Objection, That a Biſhop ought not to have a Diſpenſation to hold a Benefice *in Commendam* in his own Dioceſs, becauſe he cannot viſit himſelf.

But this Objection is eaſily anſwered, (*viz.*) tho' he cannot viſit himſelf, he may be viſited by the Metropolitan.

Beſides there would be no Inconveniency if in ſuch Caſe there was no Viſitation at all, becauſe the Nature of a Viſitation being only to reform Abuſes, it cannot be preſumed a Biſhop would be guilty of any Fault for which he ought to be viſited, when the Law hath intruſted him with the general Power to reforme all Abuſes in his Dioceſs.

But in the *Caſe* of (*b*) Doctor *Eades* and the *Biſhop of Oxford*, which was a Diſpenſation in *Commendam Retinere as long as he ſhould live, and continue Biſhop of Oxford*, that was held good; for if a *Commendam Retinere* for Life, is good as certainly it is; if 'tis good alſo for Years, what reaſon can be given, why a Diſpenſation for Life, or *as long as a Man ſhall continue Biſhop of ſuch a Place*, ſhould not in like manner be good.

Commiſſary.

THIS is a Perſon deputed by the Biſhop's Grant to exerciſe Eccleſiaſtical Juriſdiction in particular Caſes, and in ſuch remote parts of his Dioceſs, from whence the People cannot conveniently come to attend his *Conſiſtory Court*; and for this reaſon a *Commiſſary* is called by the Canoniſt, *Officialis foraneus*.

He is an Officer created upon Neceſſity; for when the Biſhops were bound to attend the publick Services of the Kingdom, by reaſon of their Tenures; they at firſt deputed *Chancellors* to hear thoſe Cauſes wherein they had Juriſdiction.

(*b*) Vaugh. 18.

After-

Afterwards when thoſe Cauſes encreaſed, and by various Canons, Diſtinctions, and Deciſions the Eccleſiaſtical Judicature was made more intricate, it was almoſt impoſſible for *Chancellors* to determine all thoſe Cauſes in the *Conſiſtory Courts*, and therefore it was neceſſary for the Biſhop, as well for the Eaſe of the People, as for the Diſpatch of ſuch Cauſes in particular places in his Dioceſs, to ſubſtitute a (*c*) *Commiſſary*, and this he may do in every Archdeaconry, or he may appoint one throughout the whole Dioceſs.

He is uſually made by the Biſhop's Grant, confirmed by the Dean and Chapter; and when that is done, he may enjoy the (*d*) Office for his own Life, and not only for the Life of the Grantor; tho' that was a Queſtion formerly, whether a *Commiſſary* of a Dean ſhould hold his (*e*) Office after the Death of the Grantor, and againſt his Succeſſor.

Then as to the *Perſon*, by the (*f*) 37 *H.* 8. a *Layman*, being *Doctor of Laws*, may be made a *Commiſſary*; which Statute is not reſtrictive, that no other Perſon ſhall be a *Commiſſary*, but a Doctor of Laws; for (*g*) *Anno* 35 *Eliz.* a Batchelor of Laws was made a *Commiſſary*, and he granted Adminiſtration, and it was held good.

And not long afterwards the Eccleſiaſtical Canons were made, by which 'tis ordained, that a *Commiſſary* muſt be Twenty ſix Years old, and one who is learned in the Civil and Eccleſiaſtical Laws, that he muſt be either a Maſter of Arts, or Batchelor of Law; and that before he is admitted to his Office, he muſt take the Oath of Supremacy, either in the preſence of the Biſhop, or in Court, and ſubſcribe the 39 *Articles*; and muſt likewiſe take an Oath, that he will, to the beſt of his Underſtanding, well and truly execute his Office, without reſpect or favour of Reward.

He differs from a *Chancellor* only in reſpect of Juriſdiction, and the Extent thereof; for they are both made by the Biſhop's Grant, only the *Chancellor* hath a general Authority in Eccleſiaſtical Cauſes over the whole Dioceſs, but a *Commiſſary* is limited to a certain place.

Common-Prayer.

SINCE the common Neceſſities and Duties of all Chriſtians are the ſame, thoſe who conform to the eſtabliſhed Religion here, have agreed upon a fixed and ſtated Form of

(*c*) 1 Rol. Rep. 435. (*d*) 10 Rep. 61. (*e*) Noy 153. (*f*) Cro. Car. 258. (*g*) Cro. Eliz. 315.

Prayers,

Prayers, Praiſes and Thankſgivings, to be uſed in our publick and ſolemn Devotions, which are contained in a Book called, *The Book of Common-Prayer.*

And altho' ſome think it unlawful to pray to God in Set Forms and Words, yet thoſe who are of that Opinion, do not pretend to Inſpiration, but they affirm the Holy Spirit doth help them in their preſent and ſudden Conception, by which they are more earneſtly excited to implore the Bleſſings of Heaven, and forgivneſs of their Sins.

I will not enter into any Diſpute here concerning this Matter, having never yet met with any ſolid or convincing Argument, to determine why the Spirit of God ſhould not be aſſiſting to us, when we pray for a thing in a Form of Words, as well as when we pray for the ſame thing in various and changeable Words, according to our Fancies and Emotions.

Neither ſhall I diſcourſe of the Antiquity of common Forms of Prayer, which hath already been done by Men of Learning, and brought down to us from the Time of the Apoſtles, thro' all Ages of the Chriſtian Church; they have ſhewed us, that there was never any Church or Society of Chriſtians till of late, that held it unlawful to pray by a Common Form, they have told us, out of the *Bibliotheca Patrum*, that there was a Liturgy in the Church of *Alexandria*, which is attributed to St. *Mark*, who was the firſt Biſhop there; which tho' intermixt with ſome new and unwarranted Additions, yet thoſe do not deſtroy the Antiquity of the Original.

They have told us likewiſe, that St. *James* himſelf compoſed a *Liturgy*, which he left to the *Church of Jeruſalem*, of which he was alſo the firſt Biſhop; this is affirmed by *Sixtus Senenſis*, and by the Fathers of the Third *Council* aſſembled at *Conſtantinople* under *Juſtinian* the Younger, at a place in his *Palace*, called *Trullo*, about 680 Years after the Birth of Chriſt; and the like hath been ſhewed us in reſpect to other Churches, who had their Liturgies enlarged by the Prayers of great Men, ſuch as St. *Baſil*, St. *John Chriſoſtome*, *&c.* in the *Eaſtern* Churches.

'Tis enough for me to ſhew, that here in *England*, in the time of the *Saxons*, the *Council* of *Cloveſhoe* was held under *Cuthbert*, *Archbiſhop of York*, by which *Council* the Prieſts were required to learn the *Lord's-Prayer* in *Engliſh*, and by the (*b*) Canons of *King Edgar* and *Egbert*, they were en-

(*b*) Can. Egb. 2. Can. Edg. 45.

joined

joined conſtantly to uſe it in their Churches; and it will not be denied, that in the *Roman Church* there were always Forms of Prayer, as may be ſeen in their *Miſſals*, *Breviaries*, *Rituals*, *Pontificals*, *Manuals*, *Roſaries*, &c.

But the *Common-Prayers* which are now uſed in the Church of *England*, were by the ſeveral Gradations following, thus eſtabliſhed.

Thoſe Offices mentioned before, and which were uſed in the Church of *Rome*, being ſo many, and every Religious Order having likewiſe ſome peculiar Rites and Services adapted to themſelves, and to be performed on the Saints Days which belonged to their reſpective Orders; it was a very difficult thing to underſtand in what manner to officiate.

In the *South* Part of *England* the Offices were after the Uſe of *Sarum*; in the *North* they were after the Uſe of *York*; in *Southwales* after the Uſe of *Hereford*; and in *Northwales*, thoſe after the Uſe of *Bangor*, were generally received; and in *Lincoln*, and other Places, there were proper Offices appointed to be uſed; and when any Prelate was made a Saint, there were Collects, and particular Forms, uſed for him in his Dioceſs.

Therefore, *Anno* 2 *Ed.* 6. the *Protector*, and the reſt of the King's *Council* thought it expedient, that there ſhould be one uniform Order of publick Worſhip throughout the Kingdom; and in order to prepare and compoſe ſuch a Form, there was a Committee of particular Divines appointed, (*viz.*) the Two Archbiſhops, Sixteen other Provincial Biſhops, and Six Doctors of Divinity to examine and reform all the old Offices of the Church.

Theſe Perſons met at *Windſor-Caſtle*, and the firſt thing they did, was to examine the manner of Adminiſtration of the *Euchariſt*, of which I ſhall give an Account in another place, under the Title *Sacrament*.

But to proceed, The *Committee*, upon Examination of theſe Offices, found them ſo Superſtitious, that they rather reſembled the Rites of Heathens than Chriſtians; and thereupon they rejected every thing which was not warranted by Scripture, and reduced other Matters to their primitive Purity.

In the compiling this Book, the Reformers began with the Morning and Evening Prayers, which they put in the ſame Form we now have, only the Confeſſion of our Sins, and the general Abſolution to Penitents were omitted.

The Communion Service was likewiſe the ſame as 'tis now, only the Ten Commandments were not read in that Service.

And

And becauſe Religion was clouded with many Ceremonies, therefore they rejected all ſuch which had been abuſed by Superſtition, and retained thoſe which were decent, and which tended to move our Affections by ſome apt and good Significations; and they prefixed a *Preface* concerning ſuch Ceremonies, which is the ſame now printed before the Book.

Theſe Alterations in the publick Offices of Worſhip, created great Heats amongſt the People, which were excited chiefly from the Pulpit; and therefore Preaching was prohibited for a time, by any Perſon not Licenſed by the King, or his Council, or by the Archbiſhop *Cranmer*.

Afterwards the major part of the ſaid Commitee framed a Bill which they brought into the (*i*) Houſe of Peers on the *9th Day of December*, and which lay before them a long while; for Eight of the Sixteen Biſhops, who were of the Committee, and Three Temporal Lords, proteſted againſt it, by which they ſhew'd their Unwillingneſs to make any Alterations, but they were reſolved to obey when it came to be enacted into a Law.

The Preamble of this Bill was, That there had been different Forms of Prayer and Service, *&c.* that the moſt effectual Endeavours could not divert the People from their old Cuſtoms; and that therefore there might be an uniform way of Service, *&c.* the *King*, by the Advice of the *Lord Protector*, and his Council, had appointed the Archbiſhop of *Canterbury*, and other Learned Biſhops and Divines (having reſpect to the moſt pure Chriſtian Religion, and to the Practiſe of the Primitive Churches) to make one convenient Order and Rite of *Common-Prayer*, which they had done *by the Aſſiſtance of the Holy Ghoſt*, and delivered to the King, in a Book Entituled, *The Book of Common-Prayer and Adminiſtration of Sacraments, &c.* wherefore the *Parliament* conſidering the ſaid Book, moſt humbly thanked the King for his Care, and did enact, that the ſaid Form of *Common-Prayer*, and no other, ſhould be uſed thro' *England*, at *Whitſontide* following.

But becauſe ſome things were contained in that Book, which ſhewed a Compliance to the Superſtitious Humours of thoſe Times; and ſome Exceptions being made to it by preciſe Men at Home, and by *Calvin* abroad, therefore two Years afterwards it was reviewed, in which *Martin Bucer* was conſulted, and ſome Alterations being made in it, which conſiſted in adding ſome things, and leaving out others.

(*i*) B. H. R. 2 Pf. 93.

The

The Additions were, *Viz.*

A general Confeſſion of Sins to the Daily Service.

A general Abſolution to the Penitent.

The Communion to begin with reading the Ten Commandments, the People Kneeling.

A Rubrick concerning the Poſture of Kneeling, which was afterwards by the Statute 3 *Eliz.* ordered to be left out, but is now again explained as it was *Anno* 2 *Ed.* 6.

Left out

The Uſe of Oil in Confirmation and extreme Unction; Prayers for Souls departed, and what tended to a Belief of the Corporeal Preſence of Chriſt, in the Conſecration of the Euchariſt.

This was approved by *Martin Buser*, who was of Opinion, that every thing was clearly then, according to the Scripture; and *Ayloffe*, the *Scotch* Divine, tranſlated it into *Latin* for his own uſe.

Afterwards, *Anno* 5 & 6. *Ed.* 6. a Bill was brought into the Houſe of Peers to enjoin Conformity to this new Book, with thoſe Additions and Alterations, and by which the People were enjoined to come to Prayers upon pain of Church Cenſures, which Bill paſſed into a Law in the ſame Year.

But upon the Death of that King, which happened ſoon after, the *Common-Prayers* were laid aſide, and ſome of thoſe Divines, who had been the chief Promoters of it, fled beyond Sea, where at *Frankford* there happened a Contention amongſt them; for ſome were of Opinion, that they ſhould accomodate the Worſhip of God conformable to the Uſage of the People there, and nearer to the Forms of *Geneva*, ſo that all might be united in one Way of Worſhip.

Whittingham and *Knox* engaged in this Affair, and procured their Friend *John Calvin*, (who was very famous in thoſe Parts) to write againſt the *Engliſh* Service, which he did, and declared, that in it there were many *tolerabiles ineptiæ*, as he called them.

But this Invective being not ſharp enough, for it ſeems tho' there are *ineptiæ* in it, yet they were *tolerabiles*, therefore he was required to declare his Opinion a little plainer, which he did, by calling the Forms of Prayer in that Book, *Reliquias Papiſticæ fæcis*; when the ſame Man, not above Eight Years before, had wrote to the *Protector*, to encourage him in the Reformation; and in that very Year, when the *Com-*

mon-

mon-Prayer Book was first compiled, and 'tis very probable that he had seen it; for in his Letter he approved Set Forms of Prayer, and had not then found out those *ineptias & faces*, which afterwards appeared to him.

Some other of our Divines at *Frankford* were of Opinion, that since they had used that Form in *England*, and some People were then under Prosecution for it there; for that reason they ought to use it still, otherwise it would be a Contempt to them and their Sufferings.

But upon the Death of *Queen Mary*, it was again appointed by 1 *Eliz.* to be used by every Minister, however not as it was before; for having been reviewed by Mr. *Whithead*, Chaplein to the Queen's Mother; by *Doctor Parker* afterwards, Archbishop of *Canterbury*; *Doctor Grindall* afterwards, Bishop of *London*; *Doctor Cox* afterwards, Bishop of *Ely*; *Doctor Pilkington*, afterwards Bishop of *Durham*; *Doctor May*, Dean of St. *Pauls*, who was one of the former Committee; *Doctor Bill*, Provost of *Eaton*, and *Sir Thomas Smith*; some Additions were made to it,

Viz. Certain Lessons for every *Sunday* in the Year; some Alterations in the Liturgy; Two Sentences added in the Delivery of the Sacrament, intimating to the Communicants, that Christ is not corporeally present in the Elements, *&c.* The Form of making Bishops, Priests and Deacons, was likewise added.

There were some Alterations made in the Reign of King *James*, but those were in the Rubrick only.

And as for the Additions of Thanksgivings, at the End of the Litany, the Prayer for the Queen and Royal Family, which were not in the last Book; those were added by the Authority of that King's Commission, and are still in Force by vertue of his *Proclamation*; and so are the Prayers for the Inauguration of our Kings and Queens, and for the *Gunpowder-Treason*.

This Book being thus composed, was at first thought to be adapted to those common Principles of Christianity, and was then so generally esteemed, that *Parpatio*, Abbot of S. *Saviour's*, who was sent hither by *Pius* the 4*th*, with Letters to the Queen; had Authority from the said *Pope*, to offer it should be confirmed by him; and for the first Ten Years of that Queen's Reign, the Papists did constantly attend the Service in our Churches.

This we have from no less Authority than my *Lord Coke* himself, who in his Speech against *Garnett*, condemned for the *Gunpowder-Treason*, told him, that in the beginning of the

the Queen's Reign, he had obſerved *Bedingfeild*, *Cornwallis*, and ſeveral others of that Communion, conſtantly to come to our Churches.

'Tis true, he was then but a very young Man; but the Queen, her ſelf, tells us the ſame thing in her Inſtructions to *Secretary Walſingham*, (*viz.*) that the chief of the Party in the beginning of her Reign, did frequently come to Divine Service in the Churches.

But when Pope *Pius 5th* had by his *Bull* depoſed the Queen, then the *Roman Catholicks* did generally withdraw from our Churches, and have ſo continued ever ſince.

And as the *Papiſts* conformed themſelves to this Worſhip, ſo our *North-Britains* had it in more Reverence formerly than of late; for *Buchanan* himſelf tells us, that they entered into a general and publick Subſcription to obſerve *Cultus & ritus Religionis cum Anglia Communes.*

Upon the whole Matter, the Book is now eſtabliſhed by Law, and ſeveral Puniſhments are to be inflicted, both on Miniſters and others, for not uſing or depraving it.

If a Miniſter is convicted by Verdict, or Confeſſion, or notorious Evidence of the Fact of *refuſing to uſe it, or uſing any other Form, or depraving it.*

If beneficed,
- The firſt Offence in ſuch Caſe, is Forfeiture to the Queen, which of his Benefices ſhe ſhall chuſe, and this is by Statute 2 & 3 *Ed.* 6.
- But by Statute 1 *Eliz.* 2. he loſes all his Spiritual Livings for a Year, and by both he is to be committed for ſix Months, *viz.* by the firſt Statute without Bail, and by the other indefinitely.

If not beneficed,
1. Offence, Impriſonment for ſix Months, but by the Statute 1 *Eliz. cap.* 2. for twelve Months.
2. Offence, Impriſonment for Life.

If any other Perſon ſhall be convicted (as aforeſaid) by *Songs*, or otherwiſe to have *depraved* it, or to procure a Miniſter to ſay any other Form, or to interrupt him to ſay that Service.

Firſt Offence. *Per Statute* 2 & 3 *Ed.* 6. he Forfeits Ten Pound to the Queen; and if not paid within ſix Weeks after Conviction, then to be committed for three Months; but by the Statute 1 *Eliz.* he forfeits One hundred Marks to the Queen, and if not paid as aboveſaid, ſhall, inſtead thereof, be impriſoned for a Year.

Second

Second Offence. *Per Statute* 2 & 3 *Ed.* 6. forfeits 20*l.* to the Queen, and if not paid, (*ut ſupra*) Impriſonment for ſix Months without Bail; but by Statute 1 *Eliz.* forfeits 400 Marks to the Queen; and if not paid, (*ut ſupra*) Impriſonment for a Year.

Third Offence. Forfeits all his Goods and Chattels, and muſt be be committed during Life.

Any Perſon convicted at the Aſſizes, or Seſſions, to have wittingly *heard*, or to have been preſent at any other Form of *Common-Prayer*, than what is expreſſed in the Statute 5 & 6 *Ed.* 6. *cap.* 1.

Firſt Offence. Impriſonment for ſix Months without Bail.

Second Offence. Impriſonment for a Twelvemonth.

Third Offence. Impriſonment for Life.

Juſtices of *Oyer* and *Terminer* of *Aſſize*, and Mayors, and Head Officers of Corporations, have power to hear and determine Offences againſt the Statute 2 & 3 *Ed.* 6. the Proſecution muſt be at the next Aſſizes after the Offence committed; but *per* Statute 23 *Eliz. cap.* 1. the Juſtices in Seſſions have the like Power; but the Proſecution muſt be within a Year and a Day after the Offence.

No Form of Prayer ſhall be uſed in any publick Place, other than according to the ſaid Book; and every (*k*) Incumbent, on a Benefice with Cure, tho' he keeps a Curate, is bound once in a Month to read the Service, not having a lawful Impediment, to be allowed by the Biſhop; if he neglects, he forfeits, for every Offence, Five Pound to the Uſe of the Poor; the Conviction muſt be before two Juſtices, by his own Confeſſion, or Oath of Two Witneſſes.

If the Five Pound is not paid within Ten Days after the Conviction, then the *Churchwardens*, or *Overſeers* of the Poor, may by a Warrant from Two Juſtices of the Peace, levie it by Diſtreſs and Sale of the Offender's Goods.

Beſides, upon his Induction, he muſt, within Two Months afterwards, read the ſaid Service of the Church, appointed for that Day, and likewiſe declare his unfeigned Aſſent and Conſent, to all the Matters and Things therein contained.

And that every Pariſh may be provided with this Book, 'tis enjoined by the (*l*) Canon, that the *Churchwardens*, or Queſt-men of every Church or Chappel, ſhall, at the Charge of the Pariſh, provide the Book of *Common-Prayer*.

(*k*) 13 & 14 Car. 2 cap. 4. (*l*) Can. 80.

Communion-Table.

IT may not be improper to mention ſome things concerning the Change of Altars for *Communion-Tables.*

Under the Law, Altars were built for the Sacrifices, and it ſeems reaſonable, that when the Uſe of the Thing ceaſed, the Thing it ſelf ſhould ceaſe; that is, when Sacrifices were aboliſhed, that there ſhould be no farther Uſe of Altars, eſpecially ſince our Saviour inſtituted the Sacrament, not at an Altar, but at a Table.

'Tis true, the Chriſtians called the *Table* an *Altar*, becauſe they believed the *Euchariſt* to be a Sacrifice in a double reſpect, that is, as it was a Sacrifice of Praiſe; and likewiſe of commemorating that voluntary Offering which Chriſt made of himſelf on the *Croſs*; but it was ſtill a *Table* made of Wood, and in the Form of Tables now in uſe among us; becauſe we find, that when People fled to the Sanctuary of the Church, they hid themſelves under thoſe *Tables* for the better ſecuring their Perſons.

Afterwards, when there was a general Belief of an expiatory Sacrifice in the *Maſs*, the Tables were built a little more reſembling the Forms of *Altars*, and then they were properly called by that Name.

But *Anno* 4 *Ed.* 6. it was thought, that the Form of a Table being more agreeable to the Primitive Uſe of the Sacrament, it might be ſome means to reduce the People from the Superſtition of the Maſs; and therefore, to prevent thoſe Heats and Diſorders which had happened ſince the beginning of the Reformation, concerning the Form, whether of an *Altar* or *Table*, the Government thought it expedient that it ſhould be in the Form of a *Table*.

This was begun by *Doctor Ridley*, then *Biſhop* of *London*, who in his Viſitation in that Year, amongſt many other Injunctions, gave this for one (*viz.*) whereas in ſeveral Places ſome uſe the Lord's Board after the Form of a *Table*, and ſome of an *Altar*, whereby Diviſions may ariſe amongſt the Unlearned; and for that, the Form of a *Table* may trun the Simple from the old Superſtitious Opinions of the *Popiſh Maſs*, and to the right Uſe of the *Lord's Supper*; therefore he exhorted the Curates and Churchwardens to erect and ſet up the *Lord's Board* after the Form of an honeſt *Table*, decently covered in ſuch place of the *Coir* or *Chancel*, as ſhall be thought moſt meet, and to take down all other by Altars, as he called them.

What

What was done by this good Biſhop, was afterwards approved by the King in Council, and put in Practiſe all over *England*.

And ſince that time, 'tis by the (*m*) *Eccleſiaſtical Canons*, appointed, that a convenient and decent Table be provided, kept, and repaired in every Church, and covered with Silk or other decent Stuff, thought meet for that purpoſe by the Ordinary; and when the Sacrament is adminiſtred, that it be covered with a fair Linnen Cloth, and at that time to be placed either in the Church or Chancel, that the Miniſter may be the more eaſily heard by the Communicants, and where they may more conveniently communicate.

Commutation for Pennance.

WHEN Chriſtians were perſecuted by Heathens, ſome of them became *Apoſtates*; but ſtill they continued to aſſociate themſelves with thoſe from whom they had lapſed, which gave a general Scandal to the reſt, who were of ſtricter Lives, and purer Morals; therefore it was thought neceſſary, that for publick Sins there ſhould be open and publick Confeſſions, and *Pennance* was likewiſe enjoined by the Canons, which being performed, the Penitent was re-admitted to the Church.

It was the chief Buſineſs of thoſe Councils, which were aſſembled in the 4*th* and 5*th* Centuries, to conſult about the Regulation of theſe penitentiary Canons; for they were ſo many, and ſo difficult to be underſtood, that few could attain the Knowledge of them; and therefore, in ſeveral Churches, there were peculiar Peſons called *Penitentiary Prieſts*, whoſe Buſineſs was only to attend theſe Services; and by this means they, and only they, were very expert in the Rules and Methods of *Pennance*.

But there was always a favourable Diſtinction made by theſe Preiſts, between thoſe who *voluntarily* confeſſed their Sins, and thoſe who were brought in by the Cenſures of the Church; and this made ſeveral come to Confeſſion freely, which was ſtill made in a publick manner.

And becauſe ſome of the Offences confeſſed were *Capital*, therefore about the End of the 5*th Century*, it was thought more expedient to have ſecret Confeſſions made in Monaſteries, or in any other private Place, which the penitentiary

(*m*) Can. 82.

Prieſt ſhould appoint, who was always a *Fryar*, for the Secular Clergy had no manner of Experience in theſe Affairs; and thoſe *Fryars* had ſo managed the Buſineſs, that the People were made to believe, there could be no Abſolution in ſome Particular Caſes, without a Diſpenſation from the *Pope*, which they had always ready, and for which they were paid.

But there was an unlucky Accident at (*n*) *Conſtantinople*, which defeated all ſecret Confeſſion there; for it ſeems, tho' the Confeſſion was in private, yet the Penitent was bound to publiſh ſuch of his ſecret Sins as the *Fryar* ſhould appoint; and there being a Woman at that time under a Courſe of *Pennance*, whether by Miſtake of the Prieſt, or her own, it doth not appear; but ſhe publickly confeſſed, that ſhe had committed Adultery with a Deacon of that Church, which gave ſo great a Scandal, that the Biſhop broke the Cuſtom there; however, we know it was retained long after, and even to this Day, in other Places.

About the End of the *8th Century*, *Commutation* for *Pennance* was introduced; and this was either for Services to be done to the Church, or for Money to be paid to the Prieſt.

The *Services* for which *Pennance* was *commuted*, were either Vocal Prayers, or ſo many *Pater Noſters* to be ſaid, within a limitted time, or ſo many Maſſes; but when the *Pope* had depoſed any Prince, then all the Methods and Rules of *Pennance* were diſpenſed withal, to ſuch who ſhould Fight under the Croſs, againſt that Prince.

But in a little time all thoſe things were laid aſide for Money, which was never refuſed at firſt from the Rich; for it was then, and is ſtill, accounted the beſt *Commutation* that can be had for *Pennance*.

This we find in Doctor *Barker*'s Caſe, which is imperfectly reported by (*o*) *Serjeant Rolls*, in Scraps of *Engliſh* and *French*; but probably it was, becauſe his Pocket was pick'd of his *Notes* (as he tells us) coming from the *Star-Chamber*; but it was thus.

The Doctor was *Official* in the Dioceſs of *Oxon*, and the Regiſter of his Court libelled againſt him in the *Star-Chamber* for taking *Commutation* before any *Pennance* was actually enjoined in the Preſence of that Regiſter, and made an Act of Court; and for that the Money was taken in his Chamber which he kept, and did not apply to charitable uſes as he ought.

(*n*) Socrat. Hiſt. Lib. 5. cap. 19. (*o*) 2 Rolls Rep. 384.

The

The Proof was, that when an Offender was before the Doctor in private, he asked him whether he knew a thing called *Commutation*, the Perſon, replied, he did not; then the Doctor informed him, it was, that one good Turn required another; this being eaſily apprehended, he offererd the Doctor Ten Pound, which he refuſed to receive in Perſon; ſo the Money was given to his Servant, who left it on the Doctor's Table.

My *Lord Hobert*, and the reſt of the Judges, would not cenſure the Doctor, becauſe this was no poſitive Proof of his taking the Money, tho' it was walking very near the Brink of falling, and receiving Money not with a Full, but trembling Hand.

But the chief Juſtice thought it convenient, both for the Church, and for the whole Nation; that ſome Order ſhould be made in how long time the Money might be kept before it was employed in Charity; and one of the Judges was of Opinion, that in ſome Caſes the Money might be taken, not only when the Court was not ſitting, but out of the Dioceſs; as for inſtance: Thoſe Caſes which are *Contentioſæ Juriſdictionis*, muſt be determined in open Court; and in ſuch Caſe there ſhall be no *Commutation* without the conſent of the Proſecutor; but in Caſes *Voluntariæ Juriſdictionis*, as where the Enquiry is *Ex officio*, there 'tis otherwiſe.

The Archbiſhop, at that time, adviſed with the *Civilians*; and from them, and by his own Experience, he tells us, that *Commutation* agreed with the Eccleſiaſtical Canons, that it was likewiſe juſtified by the common Law, in that I believe he was miſtaken; but he was right in affirming, that it was juſtified by the Statute *Circumſpecte agatis*, by which the Temporal Judges are adviſed to take care how they puniſh thoſe who hold Pleas in Spiritual Courts, for Fornication, Adultery, *&c.* for which ſometimes a corporal, and at other times a pecuniary Puniſhment is inflicted; by which Words, my (p) *Lord Coke* tells us, *Commutation* is meant; and ſo it is in the Statute, called *Articuli Cleri*, by which 'tis provided, that if a Prelate enjoin corporal Pennance, and the Party afterwards commutes for Money, 'tis recoverable in the Spiritual Court, and no Prohibition will lie in ſuch Caſe.

(p) 2 Inſt. 489, 2 Inſt. 619.

Compoſition Real for Tythes.

A *Real Compoſition* is, where the Incumbent, together with the Patron and Ordinary, by Deed executed under their Hands and Seals, do agree, that ſuch Lands ſhall be diſcharged of Tythes, which are mentioned in the Deed, paying ſome annual Payment, or doing ſomething for the Profit or Advantage of the Parſon; and this is a legal Exemption from Payment of Tythes, if made before the Statute 13 *Eliz. cap.* 10. by which all Eſtates made of Tythes, other than for 21 Years, or three lives from the making thereof, *&c.* are made void.

Some Inſtances we have of this Nature in our Books, (*viz.*) as where an (*q*) Abbot was ſeized of a Farm, ſituate within a Prebend, and he and the Prebendary made a real Compoſition in the Reign of *H.* 3. that he and his Succeſſors ſhould be for ever diſcharged of Tythes of ſo much of the ſaid Farm as they uſed themſelves, paying to the Prebendary Five Marks *per Annum.*

About 100 Years afterwards, there was another Compoſition made between an Abbot and a Prebendary of the ſame Prebend, reciting the former Compoſition; and that it ſhould be at the Election of the Prebendary, to take the Tythes in kind, ariſing out of the whole Farm; and not only out of thoſe Lands which the Abbot manured himſelf, or to have the Five Marks.

The Prebend afterwards came to the Crown, and it was held, that the firſt Compoſition was good, but the ſecond was not; becauſe, ſince the Prebend came to the Crown, there could be no Election made according to that Compoſition.

The Learned *Biſhop of Worceſter*, hath made a Queſtion, whether a *Real Compoſition* is binding, if made for a thing within time of Memory; as for Tythe of Hops, which were not uſed in *England* before the Reign of *H.* 8; but he gives no ſatisfactory Anſwer to the Queſtion.

However, I can ſee no reaſon if ſuch a Compoſition was made before the Statute 13 *Eliz.* but that it ſhould be binding.

'Tis true, a Man cannot preſcribe for a (*r*) *Modus* in ſuch Caſe, becauſe 'tis the Nature of a Preſcription to be immemorial; and the firſt uſe of Hops was within time of Memory.

(*q*) Hardres 381. (*r*) Sid. 443.

But

But it was from theſe Compoſitions that moſt Preſcriptions, *De modo decimandi*, did at firſt ariſe; tho' 'tis probable, that ſome of them began, and were continued by the Negligence of the Clergy themſelves.

The Canoniſts have made ſome Limitations in this Caſe; but firſt they lay it down for a Rule, that Cuſtom ſhall not prevail for the Payment of leſs than a tenth Part; but then they ſay, this muſt not be underſtood where it relates to the Payment of perſonal Tythes, which aroſe purely by the Labour or Art of Men; for in ſuch Caſe the Clergy may acquieſſe with a good Conſcience, under a Cuſtom, to pay leſs than the real Value of the tenth Part of the clear Gains; for they accept *Eaſter*-Offerings of the People, which are a kind of Compoſition for Perſonal Tythes.

Beſides, Perſonal Tythes are founded upon the ſame Laws as all other Tythes are, now by the Statute 2 *Ed. 6. cap.* 13. predial and mixt Tythes are reduced to ſuch *a Cuſtomary Payment*, as had been uſed Forty Years before the making that Act, where, by the Words *Cuſtomary Payment*, ſomething leſs is intended than the real Value of the tenth Part; and if ſuch a Payment is eſtabliſhed by Law, for thoſe Tythes, it may alſo be good for Perſonal Tythes.

'Tis true, the Canoniſts would not ſeemingly allow leſs than the tenth Part in any Tythes; but to extenuate the Matter, they did, by Provintal Conſtitutions, ſet a leſs Value upon things out of which the Tythes were to ariſe, than they were really worth; as for Inſtance: *Anno* 7 *H.* 7. there was but a half Penny paid for a Lamb of a Year old, that being accounted the Tenth of the Value of a Lamb of that Age, which Payment was allowed to be good.

The *Biſhop of Worceſter* ſeems to incline, that this muſt be grounded upon ſome real Compoſition, becauſe a Lamb of a Year old was worth more than five Pence in thoſe Days; but it may as well be grounded upon ſetting a leſs Value on the thing it ſelf, tho' I confeſs this is no very good Inſtance of it; for 'tis probable a Lamb of a Year old was not worth more than five Pence at that time; becauſe I find that *Anno* 25 *H.* 8. which was long afterwards, the Price of a fat Lamb was but a Shilling.

Theſe real Compoſitions are diſtinguiſhed from Perſonal Contracts; for tho' the one have been always allowed to be a good Diſcharge for the full Tythes, yet the other are not.

Now that *Compoſition*, which is called *a Perſonal Contract*, is only an Agreement between the Parſon and the Pariſhioners, to pay ſo much in Lieu of Tythes; and tho' ſuch

an *Agreement* is confirmed by the *Ordinary*; yet that doth not make it a (*ſ*) *Real Compoſition*, becauſe he ought to be a Party to the Deed; and his confirming it afterwards, doth not make him ſo, neither doth it alter the Nature of the Agreement.

Such a *Perſonal Agreement* was held good, (*t*) *Anno* 4 *Jac.* 1. if it was for Years, tho' only verbal: But in the ſame King's Reign, about Nine Years afterwards (*u*) it was held otherwiſe; that ſuch a verbal Agreement is neither good, or binding to the Parſon, or his Succeſſors, if intended to paſs a (*x*) Right; but 'tis good to bar the Parſon from an Action of Debt, upon the Statute 2 *Ed.* 6. for not ſetting out the Tythes.

But now, ſince the Statute 13 *Eliz. cap.* 10. 'tis held, that no real Compoſition can be good to bind the Succeſſor; becauſe, by the Statute, the Grants of Eccleſiaſtical Perſons are reſtrained to one and twenty Years, or three Lives.

Confirmation of Leaſes; See in Title Leaſes.

Confirmation of Biſhops.

THIS is done by a long and formal Proceſs, of which I ſhall give the Reader a ſhort Account.

After the Dean and Chapter elected the Parſon recommended to them by the Queen, to be the ſucceeding Biſhop to a vacant See; and this Election is certified to the Queen, and to the Archbiſhop of that Province; ſhe grants her Royal Aſſent under her Great Seal, which is exhibited to the Archbiſhop, requiring him to *confirm* the Election, upon which he ſubſcribes *fiat Confirmatio.*

The Archbiſhop thereupon iſſues forth a Commiſſion under his Epiſcopal Seal, directed to the Vicar-General, to perform every thing requiſite to ſuch Confirmation.

The Vicar-General iſſues forth a general Citation for all thoſe to appear, who have any thing to offer againſt this Election; which Citation being returned, the Proctor for the Dean and Chapter exhibites the Queen's Aſſent to the Election, and her Commiſſion to the Archbiſhop to confirm it, which the Vicar-General reading, accepts it.

(*ſ*) March 87. (*t*) Yel. 94. (*u*) Hob. 176. (*x*) Raym. 14.

Then

Then the Proctor exhibites the Proxy for the Dean and Chapter, and preſents the elected Biſhop to the Vicar-General, returns the Citation, and deſires that the Oppoſers may be thrice publickly called; which being done, and none appearing, he deſires the Vicar-General to proceed, which is ordered accordingly.

Then the Proctor exhibites a ſummary Petition, containing the whole Proceedings and Deſires, that a Time may be appointed for him to prove it, which the Vicar-General decrees.

Then he again exhibits the Aſſent of the Queen and of the Biſhop, and the Certificate of the Election to the Archbiſhop, deſiring a time for a final Election, which is likewiſe decreed.

Then the Proctor once more deſires, that all Oppoſers may be called; which done, and none appearing, they are pronounced *Contumaces*, and a Decree is then made to proceed to Sentence.

Then the Biſhop having taken the Oaths againſt Simony of Supremacy, and of Canonical Obedience; the Sentence is read and ſubſcribed by the Vicar-General, by which the Election is confirmed, and decreed to be good.

And till this *Act of Confirmation* is performed, the Biſhop's Elect may be rejected, becauſe there may be ſome Reaſons given, why he ſhould not be made a Biſhop; and for that purpoſe thoſe Citations above-mentioned are made for any Man to come in, who hath juſt reaſon to oppoſe it.

After (y) *Confirmation* the Power of the Guardians of the Spiritualties ceaſeth; and if a Writ is directed *Epiſcopo electo & confirmato* 'tis good; and the Queen may *ex Gratiâ* after ſuch Confirmation, and before Conſecration grant the Temporalties to the Biſhop, thus elected and confirmed.

But if the Biſhop of one Dioceſs is tranſlated to another, there is no Occaſion of a new *Confirmation*.

Juſtice Doderidge, in his Argument of *Evans* and *Aſcue's* (z) Caſe, tells us, there is a Spiritual Marriage between the Biſhop and his Church, which is begun by Election, contracted by Confirmation, and conſummated by Conſecration; and that the Reſtitution of the Temporalties is like conducting the Man to the Woman, ſo that he is not a compleat Biſhop by Confirmation; he hath only *Poteſtatem Juriſdictionis*, for he may certifie an Excommunication, he may give Inſtitution; and this appears by the Year-Book 22 *Ed.* 3. *Plito* 25. where the Caſe was thus:

(y) Dyer 350. (z) Palm. 472.

The

The Plaintiff had recovered, in a Writ of Right of Advowſon, and had a Writ directed to the Biſhop of *Norwich*, *Electo & Confirmato*, to admit his Clerk; the Biſhop refuſed, and thereupon another Writ of *Quare non admiſit* iſſued againſt him, reciting the Recovery, and the former Writ directed *Epo' electo & Confirmato*, and this was held to be good by one of the Judges, who was angry with his Brethren for being of a contrary Opinion, *viz.* that it ought to be *tunc electo & Confirmato*, which ſhews, that if the Writ had been right, a Biſhop elected and confirmed, might have granted Inſtitution.

Conſecration of Biſhops.

AFTER *Confirmation*, the next thing to be done is *Conſecration*, and this is done by ſeparating the Perſon to the Holy Office of a Biſhop, by Impoſition of Hands and Prayer, 'tis uſually performed by the Archbiſhop: but when an Archbiſhop is to be conſecrated, it muſt be done by an Archbiſhop, and two other Biſhops, according to the 4th Canon in the firſt *Nicene Council*, or elſe by Four Biſhops; and this is required by the Statute 25 *H.* 8. *cap.* 20. which is agreeable to that Anſwer *Pope Gregory* gave to St. *Auſtin*, asking him, whether a Biſhop might be ordained without the Preſence of other Biſhops, if by reaſon of any great Diſtance they could not be preſent, who poſitively affirmed it could not be done; but that at the Ordination of a Biſhop there ought to be Three or Four other Biſhops aſſiſting.

After Conſecration, the Biſhop is complete, as well in relation to Spiritualties as Temporalties; and by the Civil Law, this was held eſſential to the Office and Dignity of a Biſhop, 'tis an indelible Character, of which he can never afterwards be deprived, tho' the Execution of Spiritual Juriſdiction, and all the Profits of his Biſhoprick ſhould be taken away: He hath *Poteſtatem ordinis*, for he may confer Orders, and conſecrate Churches, and hath ſuch an abſolute Right to the Temporalties, that tho' they be granted to him, *ex Gratia*, immediately upon Confirmation, yet he cannot ſue for them till after Conſecration.

But when a Biſhop is tranſlated, there is no Occaſion of a new Conſecration.

As to the particular manner of Conſecration, 'tis preſcribed in the Book of *Common-Prayer*, which is eſtabliſh'd by Law, tho' *Biſhop Bonner* objected againſt *Archbiſhop Parker's* Con-

Conſecration, that the very *Office of Conſecration* had no legal Authority; for he inſiſted, that the *Common-Prayer-Book* was eſtabliſhed by an Act of Parliament, *Anno* 5 & 6 *Ed.* 6. which Act was repealed by *Queen Mary*, and that Book expreſly condemned.

'Tis true, *Queen Elizabeth* enacted again *King Edward's Common-Prayer-Book*, and repealed that Law made by her Siſter; but the *Office of Conſecration* was not expreſly named in this laſt Act of Repeal, and therefore it could not be revived, unleſs it had been particularly named; and if ſo, the Objection is, that a Conſecration performed by that Book, is not according to Law.

But this will receive a plain Anſwer, for the Office of Conſecration was made part of the *Common-Prayer-Book*, by the Statute 5 *Ed.* 6. and when that was re-enacted after a Repeal, there was no Occaſion to mention it diſtinctly, becauſe it was part of the *Common-Prayer-Book* before; however it was declared by a ſubſequent Parliament, that the *Office of Ordination* was confirmed as part of the *Common-Prayer-Book*, and then they declared it to be good; which is likewiſe declared ſo to be, by the 36*th Article* of our Religion.

And here I cannot but take Notice of the Conſecration of *Archbiſhop Parker*, which the Adverſaries of the Church of *England* affirm to be irregular, both as to the *Place* where it was done, which they ſay was at the *Nagg's Head Tavern* in *Cheapſide*, when it ought to have been at ſome Church or Chappel; and likewiſe as to the *Manner of doing* it, which they ſay was by one of the Biſhops then preſent, who laid the *Bible* on his Head, and then pronounced theſe Word; *Take thou Authority, &c.* when it ought to be done by Impoſition of Hands and Prayer, accompanied with other Words, (*viz.*) *Receive the Holy Ghoſt.*

'Tis farther objected, that Three of the Four Biſhops then preſent were only Biſhops Elect, and had no Sees; and that the other was a Suffragan; ſo that if *Archbiſhop Parker's* Conſecration was not good; all thoſe who were conſecrated by him were not Biſhops, becauſe he could not confer that Character upon others, which he had not himſelf.

The Story hath long ſince been confuted by Biſhop *Bramhall*, but 'tis ſet in a clearer Light, by the Learned *Biſhop of Sarum*, which was thus:

The Queen iſſued forth her Warrant, directed to the Biſhop of *Landaffe*; to Doctor *Scory* Elect of *Hereford*, Doctor *Barlow* Elect of *Chicheſter*, Doctor *Coverdale* Elect of *Exceſter*, and Doctor *Hodgkins* Suffragan of *Bedford*.

All

All theſe Perſons met at the *Naggs-Head* Tavern, where it had been uſual for the Dean of the Arches, and the Civilians, to refreſh themſelves after any Confirmation of a Biſhop; and there one *Neale*, who was *Bonner*'s *Chaplain* peeped thro' a Hole in the Door, and ſaw all the other Biſhops very importunate with *Landaffe*, who had been diſwaded by *Bonner* to aſſiſt in this Conſecration, which he obſtinately refuſing, Doctor *Scory* bid the reſt kneel, and he laid the *Bible* on each of their Shoulders or Heads, and pronounced theſe Words; *Take thou Authority, &c.* and ſo they ſtood up all Biſhops, of which I ſuppoſe Doctor *Parker* muſt be one, tho' my *Lord of Sarum* doth not mention it.

This Story was certainly invented after the Queen's Reign; for if it had been true, 'tis ſo remarkable, that ſome of the Writers of that Time would have taken Notice of it.

But my *Lord of Sarum* hath diſcovered the Falſity of it, from an Original Manuſcript of the Conſecration of this very Archbiſhop, which was done in the Chappel at *Lambeth*, on *Sunday* the 17th Day of *December*, in the firſt Year of that Queen's Reign, where Doctor *Parker* came a little after Five in the Morning, in a Scarlet Gown and Hood, attended by the ſaid Four Biſhops, and lighted by Four Torches; and there after Prayers, Doctor *Scory* preached; then the other Biſhops preſented the Archbiſhop to him and the Mandate for his Conſecration being read by a Doctor of the Civil Law, and he having taken the Oaths of Supremacy, and ſome Prayers being ſaid, according to the Form of Conſecration then lately publiſhed, all the Four Biſhops laid their Hands on the Archbiſhop's Head, and ſaid, *Receive the Holy Ghoſt, &c.* and this was done in the Preſence of ſeveral other Doctors.

After this Conſecration the Archbiſhop amongſt others, conſecrated *Doctor* Jewell *Biſhop of Salisbury*, who by reaſon of this Story, was never allowed to be a Biſhop by his Adverſary *Harding*.

Conſiſtory-Court.

AFTER the Empire became Chriſtian, and Princes had given Biſhops Juriſdiction in particular Caſes, it ſeemed neceſſary, that they ſhould have proper Courts where ſuch Cauſes ſhould be determined; for it was probable, that an Eccleſiaſtical Judge might give them a quicker Diſpatch, and in a more regular manner than one of another Profeſſion.

Be-

Beſides there might be a politick Reaſon for it (*viz.*) that ſuch Diſputes and Differences which did ariſe amongſt the Clergy might be kept amongſt themſelves, and not divulged amongſt Laymen to the Diſcredit of the whole Order.

But with us here in *England*, the Eccleſiaſtical Juriſdiction in the *Saxon* Reigns, was not ſeparated from the Civil; for the *Earl* and the *Biſhop* ſate in one Court, that is in the County-Court; and all Cauſes were determined either there, or in the Sheriff's Turn, as well thoſe which concerned God's Right as the Worlds (which was the Phraſe of thoſe times).

'Tis incertain how long this mixed Juriſdiction continued after the Conqueſt, ſome are of Opinion not very long; becauſe *King William*, in a Charter which he granted to the Dean and Chapter of St. *Mary* in *Lincoln*, commanded that no Biſhop *de legibus Epiſcopalibus amplius in hundredo placita teneat*, and that he ſettled the *Conſiſtory-Court*, and ordered ſuch Cauſes to be tried there.

But this Charter may very well be ſuſpected to be true; for my *Lord Coke* himſelf tells us, That no Account can be given of it, till 2 *R.* 2. and that he found it was not enrolled at that time in the Regiſtry of the Biſhop of *London*.

Beſides 'tis very certain, that this mixed Juriſdiction continued many Years afterwards; for in the *Red Book of the Exchequer*, amongſt the Laws of *H.* 1. in the Chapter *de generalibus placitis comitatum*, we have an Account, that the Biſhops and Earls did there meet, and heard Eccleſiaſtical Cauſes.

'Tis probable this Juriſdiction came to be divided ſometime in the Reign of *H.* 2. when *Archbiſhop Beckett* made a Diſtinction between the Eccleſiaſtical and Civil State, and plainly told *that King*, that he had no Power to determine the Affairs of the Clergy in his Temporal Courts.

Then, and not before, were theſe Eccleſiaſtical Courts erected, which were called *Conſiſtories*, where the Biſhop himſelf, at firſt, ſate in Perſon to decide all Cauſes proper for his Juriſdiction.

But afterwards, when Biſhops became *Barons by Tenure*, and by reaſon thereof, were obliged to attend the Superior Courts; and when Cauſes were multiplied in the Conſiſtories, then it was neceſſary to delegate his Power to other Perſons, who *de jure Speciali* might hear and determine thoſe Cauſes; and this was firſt committed to *Chancellors*, who ſate in the Conſiſtory Courts, and afterwards to *Commiſſaries*, who ſate in in Places more remote from thoſe Courts.

But what was done there is in the Right of the Biſhop himſelf, becauſe from the Sentences of thoſe Judges there lies no Appeal to him, but to the Archbiſhop of the Province in his Court of *Arches*, which is his Conſiſtory.

Convocation.

THIS is an Aſſembly of all the Clergy of *England*, either in Perſon, or by their Repreſentives, to conſult of Eccleſiaſtical Affairs, and 'tis uſually in time of Parliament.

It conſiſts of two Houſes, probably in Reſemblance to our Two Houſes of Parliament; in the Upper Houſe there are Twenty two Biſhops, of which the Archbiſhop is Preſident, and theſe Perſonally ſit in the Houſe of Peers; the Inferior Clergy make the Lower Houſe of *Convocation*, and they are Repreſented by the Proctors which they elect, and do ſit by themſelves; and theſe conſiſt of all the Deans and Archdeacons of one Proctor for every Chapter, and two for the Clergy of every Dioceſs, in all One hundred Sixty ſix Divines (*viz.*) Twenty two Deans, Fifty four Archdeacons, Twenty four Prebendaries, and Forty four Proctors of the Dioceſan Clergy; they chooſe their Prolocutor, and preſent him to the Archbiſhops and Biſhops of the Upper Houſe, intimating to them, that they intend to deliver their Reſolutions by him to that Houſe; this is part of his Office; and likewiſe he is to take care that the Members attend; and he is alſo to collect their Debates and Votes; and that this may be done without Interruption, both they and their Servants have the ſame Privileges of Protection, as the Lay-Members of Parliament have during the time of their Seſſion.

This Lower Houſe of Convocation were formerly called together by two diſtinct Writs, of which I ſhall give as clear and diſtinct an Account as I can.

The firſt was the King's Writ to the Biſhops of every Dioceſs, ſummoning them to appear themſelves in Parliament, with this Clauſe in it, (*viz.*) *Præmunientes priorem & capitulum Eccleſiæ Veſtræ Archidiaconum totumq; Clerum Veſtræ Dioceſeos, facientes quod iidem Prior & Archidiaconus in propriis Perſonis ſuis dictumq; capitulum per unum idemq; Clerus per duos procuratores idoneos plenam & ſufficientem poſtteſtam, ab ipſis capitulo & clero habentes:* **Una vobiſcum interſint, modis omnibus tunc ibidem ad tractand. ordinand. & facien. nobiſcum & cum ceteris prælatis proceribus**; *& aliis incolis regni noſtri qualiter hujuſmodis periculis & excogitatis malitiis obviandum: Teſte Rege apud* Wengeham 30 *die Septembris, &c.*

This

This is called the Parliamentary Writ, and the Proceedings on it were as follow, (*viz.*) Upon the Receipt of it, the Biſhop ſent his Mandate to the Dean and Prior of his Cathedral, and likewiſe to the Archdeacon reciting this Writ to him, *&c.* and by this Mandate he commanded the ſaid Dean and Prior to appear in Perſon, and to warn the Chapter to ſend one of their Body, and the Clergy of his Dioceſs to ſend two Proctors to repreſent them in Parliament.

After the Receipt of this Mandate, the Dean, Prior and Archdeacon certified the Biſhop what they had done in Obedience to it; in which Certificate the Biſhop's Mandate was recited, the Chapter alſo met and deputed their Proxy by an Inſtrument under their Common Seal, *&c.* which was always exhibited on the firſt Day the Parliament ſate.

Some have been of Opinion, that the Clergy, at that time, ſate in Parliament, by vertue of this Premonitory Clauſe in the Biſhop's Writ, and were a conſtituent Part of it, and ſo continued till the Reign of *H.* 8. in whoſe Reign they fell under a *Premunire*, by ſubmitting to *Cardinal Wolſey*'s Legatine Power; and that tho' the King pardoned the Fault, he would not reſtore them to their former Place.

'Tis certain, that the Convocation (*a*) *Anno* 1 *Ed.* 6. apprehended, that they had a Right to ſit in Parliament; and therefore they petitioned the Archbiſhop and Biſhops in the Upper Houſe of Convocation, that they would intercede with that King, and the Protector to be reſtored to the ſame.

This was attempted again by the Clergy, in the latter end of the Queen's Reign, and a Paper was offered to her, containing ſeveral Reaſons to induce her to grant their Petition, which were to this Effect,

Becauſe the Clergy had formerly been thought very proper Perſons to conſult with the Laity about Civil Affairs, as well as altogether about Eccleſiaſtical Matters, which were ſeldom debated in Parliament.

That there would be no Danger they ſhould attempt any thing there concerning Religion, or againſt her Prerogative, becauſe they were reſtrained by an Act in her Father's Reign, to make any Attempt in Matters of that Nature without her Licenſe.

That it did not appear why they were excluded the Houſe, but that it was probable it might be becauſe they were all guilty of a *Premunire*, *&c.*

(*a*) B. H. R. 2 Pa. 47.

That

That they are ſtill ſummoned by ſeveral Writs to the Biſhops, to aſſiſt the King in Parliament.

That both the Univerſities, and the Clergy, were in a worſe Condition than the Laity, who had their Repreſentatives there; that it was not conſiſtent with the Wiſdom of the Law, that any Subject ſhould be bound by an Act of Parliament to which he was not vertually conſenting; and that ſuch Acts were then made without the Privity or Conſent of the Clergy, who being excluded the Houſe, could not anſwer any Motions made there to their Prejudice.

That reſtoring them to the Parliament, would advance the Reputation of the Clergy, by whoſe Dignity the Civil State was ſupported; and that it would be for the Honour of the Queen and her Memory, to leave ſome of the Clergy in that Houſe to ſtand up for that Government, which ſhe had eſtabliſhed in Oppoſition to any Innovations of Popery or Puratiniſm.

And laſtly, That it would recover the ancient Authority of that Houſe, to have Men of Religion and Learning reſtored to them, inſtead of Minors and Out-laws, who were injuriouſly crept into that honourable Aſſembly, that the Raſhneſs and Inadvertency of ſuch Men might be counterpoiſed by ſober and diſcreet Perſons, eſpecially conſidering that a Cypher may promote an Unit to Ten.

But theſe Reaſons did not prevail with that Queen, therefore it was endeavoured again in the next Reign, but ſtill without Succeſs; and becauſe it hath been been lately attempted, and ſtill by vertue of this Premonitory Clauſe I ſhall endeavour to give a true Account of it.

This Clauſe was firſt inſerted in the (*b*) Biſhop's Writ, *Anno* 23 *Ed.* I. it was then a time of Invaſion; for the *French* King had ſurprized *Gaſcony* by Fraud, and had provided a Navy to invade this Kingdom; this is recited in the Writ it ſelf; and our Hiſtorians tells us, That they landed at *Dover* on the 8th Day of *September*, and burnt a great part of the Town, and killed an old Monk.

The Clergy were then aſſembled by this Premonitory Clauſe, not to conſult about any Eccleſiaſtical Affairs; but as the Clauſe it ſelf imports, *Ad obviandum hujuſmodi periculis & excogitatis malitiis*; and this could not be done, but by repelling the Enemy with Force; and therefore they were ſummoned to aſſiſt the Crown, by granting a Supply out of their own Eſtates, to carry on a War againſt *France*.

(*b*) 23 Ed. Membran. 3. Dorſo.

This

This being the first occasion of the *premunientes*, it was continued in that King's Reign tho' not constantly; but when-ever the Clergy met by vertue of this Clause they were a pure Parliamentary Assembly, they were a State Convention, and not a Church Synod, and the intent of their meeting was to consult about their Civil Rights, to have their Grievances redressed, and to consider what proportion they should contribute out of their Estates towards the support of the Government, and therefore it was necessary that they should be assembled with the Parliament and end with it.

But the Clergy in the next Reign apprehended that they had no manner of obligation to obey this Lay-Summons, tho' from a King, and some of them refused to attend the Parliament upon such Summons, therefore Archbishop *Winchelsea* having an ascending Power over *Ed.* 2. who was a weak Prince, attempted to discharged them from it, and so far prevailed, that at the same time the King sent this Parliamentary Writ to the Bishops; he sent another to the Archbishop to summon all his provincial Bishops to the Convocation; the form of which Writ is printed by (*a*) Mr. *Heylin*, and by the Bishop of *Sarum*, and is thus:

Regina, &c. Reverendissimo in Christo patri Cantuarien. Archiepiscopo totius Angliæ primati, &c. Salutem quibusdam arduis & urgentibus negotiis nos defensionem & securitatem Ecclesiæ Anglicanæ ac pacem tranquilitatem & bonum publicum & defensionem regni nostri & subditorum nostrorum ejusdem concernentibus vobis in fide & dilectione quibus nobis tenemini rogando mandamus quatenus premissis debito intuitu attentis & ponderatis universos & singulos Episcopos vestræ Provinciæ, ac Decanos & priores Ecclesiarum Cathedralium ac alios Electivos exemptos & non exemptos, nec non Archidiaconos conventus capitula & collegia totumq; Clerum cujuslibet diocesis ejusdem provinciæ ad conveniendum coram vobis in Ecclesia sancti Pauli London, vel alibi prout melius expedire videritis cum omni celeritate accomoda modo debito convocari faciatis ad tractandum consentiendum & concludendum super præmissis, & alijs quæ sibi clarius proponentur tunc & ibidem ex parte nostra, & hoc sicut nos, & statum regni nostri, & honorem, & utilitatem Ecclesiæ prædictæ diligitis nullatenus omittatis, teste meipso, &c. apud Westm. 13 die Septembris, Anno Regni nostri septimo.

This is called the *Provincial Writ*, and when it first issued forth with the *Parliamentary Writ*, it was only a second Summons of those who were summoned before by the præmonitory Clause in the Bishops Writ, it was to secure the Obedi-

(*a*) Fol. B. H. R. Coll. Rec. Lib. 2. 6.

ence to the Lay-Summons, and to make the Aſſembly more Canonical as meeting by vertue of a Summons from their Archbiſhop.

The Abbots and Priors before the Reformation were Summoned to Parliament by a particular Writ directed to them, which they ſometimes refuſed to obey, becauſe it came from a Lay-man, tho' a King, and they held nothing of him *per Baroniam*.

Therefore this Writ to the Archbiſhop from the King to Summon a Convocation, at the ſame time he ſummoned the Biſhops to attend in Parliament might be a means to bring in thoſe Regulars to appear at that time, who would willingly obey the Commands of the Archbiſhop, tho' they refuſed to comply with the King's Writ.

'Tis true, the *præmonitory clauſe* is ſtill continued in the *Parliamentary Writ*, which is thus;

Præmunientes decanum & capitulum Eccleſiæ veſtræ. Cantuar ac Archidiaconos totumq; Clerum veſtræ dioceſeos quod iidem decanus & Archidiaconi in propriis perſonis ſuis & pred. Capitulum per unum idemq; Clerus per duos procuratores idoneos plenam & ſufficientem poteſtatem ab iſtis capitulo & Clero diviſim habentes pred. die & loco perſonaliter interſint ad conſentiend. hiis quæ tunc ibidem de communi conſilio dicti regni noſtri divina favente clementia contigerit ordinari, &c.

But tho' this Clauſe is continued in the Writ, the Clergy have not ſate in Parliament for ſome Ages, neither hath it been executed by any Biſhop according to the Tenor of it.

The Archbiſhops Mandate was at firſt very ſtrictly, and is ſtill executed upon the inferiour Clergy, who always chooſe their Proxies in Obedience to it, and this might be the Reaſon why the *Præmonitory Clauſe* in the Biſhops Writ was not duly obſerved; for whilſt exact and regular returns are made by vertue of that Mandate there can be no occaſion of making any return upon the *Præmonitory Clauſe* in the Biſhops Writ, and 'tis probable that this Clauſe may be continued to ſhew the right of the Crown to ſummon the Clergy without the aſſiſtance of the Archbiſhop; for tho' Convocations have been called here to conſult of Eccleſiaſtical Affairs by vertue of the Archbiſhops Legatine Power without the King's Writ, yet this was an Uſurpation upon the Crown, and when-ever we had a Prince on the Throne who would exert his Right, the People were obedient to him. Our Hiſtories mention that for ſeveral Years after the Conqueſt the Clergy were ſummoned by the King's immediate Power to attend the great Councils Nationally, that is at the ſame

tim

time the Laiety were assembled, and tho' they might make some opposition to such a Summons when the Regal Authority was eclipsed by the Papal, and would not attend the Parliament Nationally, but in provincial Synods held under their Archbishop, yet, even those Synods met with the Parliament to consult about their Civil Rights, afterwards by degrees they acted as Ecclesiastical Assemblies, and purely about the Affairs of the Church.

But both the Parliamentary and Provincial Writs passed thro' the hands of the Bishops, who were to look after the Execution of both, and in this respect they have been called Ecclesiastical Sheriffs, by the one the Bishop and his Clergy were called to the Parliament, and by the other they were summonned to a Convocation, which in effect was a Summons to Parliament, because both met at the same time.

Upon the whole matter the inferiour Clergy were in those days considered under a double Capacity, one as Members of the State, and as such they sate in the State Assemblies by vertue of the *Præmonitory Clause* in the Bishops Writ, and there they consulted of temporal Affairs, and of the Interests and Advantages both of the King and People, but when the Parliament was divided into two Houses, then the Bishops and the Clergy assembled in a Body themselves, and sate in Convocation to consult of Ecclesiastical Affairs, but the Bishops had a right likewise to sit in the upper House of Parliament, not only as Spiritual Prelates, but as they were Barons.

The other Capacity under which the inferiour Clergy were then considered, was as they were Ecclesiastical Officers convened in Synods to consult of Church Matters, and in this Capacity they were assembled by the *Provincial Writ* to the Archbishop, and the not rightly distinguishing between those two Writs hath lately occasioned such Disputes concerning their right of being summoned to sit with the Parliament, for it seems plain that when they met by vertue of the *Præmonitory Clause* in the Bishops Writ, is was necessary they should meet at the same time with the Parliament, because they were in that Assembly to assist the Civil Government by Taxes out of their own Estates, but when they were met together by the *Provincial Writ* directed to the Archbishop, in order to make Constitutions and Canons, and to consult of Spiritual Affairs they might be summoned before the Parliament met, and continued after it was Prorogued, they were not confined to that very time when the Parliament sate, for if a Convocation must necessarily be attendant on that

Honorable Houſe, then let the occaſion be never ſo extraordinary, it could not be aſſembled but whilſt the Parliament is ſitting.

But when they were under a *Præmunire* they ſubmitted themſelves to the King, and their Power is now limited by Act of Parliament, 25 *H.* 8. *cap.* 19. (*viz.*) that being aſſembled in Convocation they are not to Conſer together to make any Canons without the King's Licenſe, and if upon ſuch Licenſe and Conference they agree on any new Canons, they cannot execute the ſame without the like Licenſe; nay if the King gives his conſent they cannot be executed but under theſe Limitations.

(1.) Such Canons muſt not be againſt the Queen's Prerogative.

(2.) Nor againſt any Statute, or againſt the Common Law.

(3.) Nor againſt the Cuſtoms of the Realm.

Courts Eccleſiaſtical.

IN the time of our *Saxon Anceſtors*, one of the principal Inhabitants of the Hundred, which was called the *Alderman*, together with the Free-holders thereof, were Judges of the Hundred Court which was then called *Centuriata*, becauſe it had Juriſdiction over 100 Towns or Villages.

In this Court as likewiſe in the Sheriffs Tourn, not only the Temporal but Eccleſiaſtical Cauſes were determined, and for this purpoſe, as has been obſerved before, (under the Title *Conſiſtory Court*) the Biſhop or his Archdeacon ſate there in Perſon till the Reign of *H.* 2. and then this mixt Juriſdiction came to be divided.

And ſince this Diviſion it hath been a queſtion whether theſe Eccleſiaſtical Courts ſhould iſſue out Proceſs in their own names as they uſually do, or whether they ought to do it in the Queen's Name, and it hath been objected, that they ought to do it in the Queen's Name, becauſe, by the Statute of 1 *Ed.* 6. *cap.* 2. 'tis enacted that all Eccleſiaſtical Proceſs ſhall be in the King's name, and the *Teſte* in the name of the Eccleſiaſtical Judge, and the occaſion of making that act was, that jealouſie which remained that Biſhops acted by the Authority of the Pope and not of the King.

'Tis true, this Act was repealed by 1 *Mariæ cap.* 2. but that Repeal was taken away by the Statute 1 *Jac. cap.* 25. ſo that the Statute 1 *Ed.* 6. ſtands revived, and by conſequence the Proceſs ought to be in the Queen's Name.

But

But the Anſwer is, (*viz.*) That by a Statute made before *Edw.* 6. (*viz.*) *Anno* 25 *Hen.* 8. Biſhops had power to meet as they had formerly done, according to the Cuſtoms and Laws of the Realm: Now, before that Statute they did ſend out Proceſs in their own Names, by virtue of that Authority which they had by the Laws of the Realm, for tho' the Ancient Epiſcopal Juriſdiction here, was not derived from the Pope; but the Biſhops acted in their own names as Ordinaries, and never under the Pope, but when they were delegated by Commiſſion from him in ſome ſpecial and extraordinary Caſes.

And this was never counted any derogation to the prerogative of thoſe Princes who were the moſt Jealous of the Supremacy, ſuch as *Hen.* 8. Queen *Eliz.* &c. eſpecially ſince that Statute which annexes the Eccleſiaſtical Juriſdiction to the Crown, doth likewiſe oblige every Biſhop to take the Oath of Supremacy.

And 'tis to be obſerved, That the Controverſie in thoſe Days was not between the King and the Biſhops, but between him and the Pope; for when the Biſhops owned the Supremacy to be in the King, and refuſed obedience to the Authority of the Pope, there was little regard in whoſe name the Eccleſiaſtical Proceſs Iſſued.

Councils.

THE Learned Biſhop *Prideaux*, whom I ſhall follow in Treating on this Subject, hath defined a Council thus: 'Tis a publick Eccleſiaſtical meeting, eſpecially of Biſhops and other Doctors lawfully aſſembled, and deputed by ſeveral Churches.

Their buſineſs when aſſembled is not to determine any Political Affairs or Private Differences; but they are to examine Eccleſiaſtical Cauſes, in which the Scriptures are to be their Rule, by which they are to ſettle matters of Faith; and they are to ſettle matters of practice by Preſidents; and thoſe things which concern diſcipline by Decrees and Conſtitutions.

Councils are divided into *Judaical*, *Apoſtolical*, *Oecumenical* and *National*: Of all which I ſhall give a very ſhort account, and of the moſt material Affairs which were Tranſacted in them.

The *Sanedrin Gedolah* cannot be comprehended under the Title of a Judaical Council, tho' this was the great Council of the Jews, and conſiſted of 72 Elders, who always ſate at

Jeruſalem till *Gabinius* the Proconſul of *Syria* divided it into five Parts, and then it ſate in five diſtinct Places.

Neither can the *Sanedrim Ketannah* be accounted amongſt thoſe Councils which was a leſſer Aſſembly, conſiſting of 23 Perſons, and the reaſon in both Caſes is, becauſe Civil Matters were determined in theſe Councils, for the affairs of Peace and War; the choice of Magiſtrates for inferior Cities; and ſuch like Temporal things was the uſual buſineſs of the Great Council: And when there was a full and compleat number in the Leſſer Council, then they had power to hear and determine all Capital Offences, and to this our Saviour alludes when he adviſed his Diſciples *to beware of Men, for they would deliver them up to Councils, and Scourge them in their Synagogues*; where by the word Councils he meant the Civil, and by *Synagogues* the Eccleſiaſtical Judicature.

But thoſe Aſſemblies which may properly be called Judaical Councils were ſuch as the Tribes and Elders which were aſſembled by (*a*) *Joſhua* at *Sechem* to root out ſtrange Gods, and to prohibit all manner of Converſation with the Gentiles.

Such was the aſſembly of the Prophets on Mount *Carmel*, under (*b*) *Ahab* and *Elijah*, where the Prophets of *Baal* were firſt convicted of falſe Worſhip and afterwards put to Death; and the true Worſhip of God was miraculouſly confirmed by Fire from Heaven, at the Prayer of *Elijah*, which conſumed the Sacrifice he had prepared on the Altar.

Such was alſo the aſſembly of the (*c*) Prieſts and Levites of *Jeruſalem*, under *David*, who was at that time aſſiſted by *Gad* and *Nathan* to determine the number of Levites, and to debate about the Offices of the Prieſts, and to take meaſures for their deſtribution into ſeveral Ranks and Degrees.

Such was alſo another aſſembly of (*d*) Prieſts and Levites in the *Eaſt-Street* of *Jeruſalem* under the good King *Hezekiah*, for cleanſing the Temple from Idolatrous Worſhip, and to offer Praiſes unto the Lord as *David* had done before him.

Such was another aſſembly of the like (*e*) Perſons at *Jeruſalem*, under *Joſiah* and *Helkiah* the High Prieſt, where the Temple was again purged from Idolatry:

And laſtly, Such was that aſſembly met in the ſame City under *Zorobabel* and *Ezra*, who returned from the Captivity of *Babylon*, and ſet the Canonical Books of the Old Teſtament in the ſame Order we now have them; and ſome other Acts were begun and proſecuted in this Council, as particu-

(*a*) Joſhua 24. (*b*) 1 Kings 18. (*c*) 1 Chron. 13. (*d*) 2 Chron. 19. (*e*) 2 Chron. 34.

larly

larly the *Maſoreth* and *Hebrew* Points, for preſerving the *Hebrew* Language in which thoſe Books were Written, that the ſame might be truly tranſmitted to Poſterity.

Apoſtolical Councils.] The Apoſtolical Councils may be reduced under ſuch which were aſſembled againſt the Apoſtles, and by them.

Thoſe which were aſſembled againſt them was by (*f*) *Annas* the High Prieſt, *Caiphas*, *John* and *Alexander*, and as many more as were of kin to the High Prieſt, and this was to ſuppreſs the Goſpel in it's very Infancy; for they made a Decree that none ſhould ſpake or teach in the name of Jeſus.

The ſame Perſons were reaſſembled with the *Sadducees* who committed the (*g*) Apoſtles to Priſon, from which they were miraculouſly delivered by the Angel of the Lord, then there was a deſign to put them to Death, which was diverted by the Speech of *Gamaleel*, who told the People that if what the Apoſtles did was of their own Heads it would come to nothing, but if from God it would ſtand.

In a Synagogue of the (*h*) Libertines (who were the Sons of ſuch Jews who were free Denizens of *Rome*) *Stephen* was accuſed by falſe Witneſſes and afterwards put Death.

In another Council of Phariſees and Sadducees aſſembled under *Ananias* the High Prieſt, St. *Paul* was ſmitten on the Face, and had been tore to pieces by the Rabble if *Claudius Lyſias* the chief Captain had not Reſcued and brought him to the Caſtle; and he was not very ſafe there, for the Captain conducted him from thence to *Ceſarea*, and delivered him to *Felix*, who kept him Priſoner in *Herod*'s Judgment Hall.

But the Councils which were aſſembled by the (*i*) Apoſtles were firſt, that of 120 Perſons under *Peter*, to ſubſtitute an Apoſtle in the room of *Judas* who had betrayed our Saviour, and the Lot fell upon *Mathias*.

There was another conſiſting of a multitude of Diſciples aſſembled by the (*k*) Apoſtles to chooſe the Seven Deacons.

In another the (*l*) Apoſtles and Elders were aſſembled at *Jeruſalem* to determine that Queſtion which was ſo warmly diſputed between *Paul* and *Barnabas*, whether the Gentiles converted to Chriſt, and living amongſt the Jews ſhould be Circumciſed and obſerve the Ceremonial Law, and it was determined in the Negative, becauſe Juſtification might be obtained by the Grace of God alone in Chriſt.

Such were the Brethren aſſembled at *Jeruſalem* under (*m*) *Paul*, where the Converted Gentiles were allowed to obſerve

(*f*) Acts 4. 6. (*g*) Acts 5. (*h*) Acts 6. (*i*) Acts 1. (*k*) Acts 6.
(*l*) Acts 15. (*m*) Acts 21.

ſome parts of the Ceremonial Law for a time, that by ſuch an example and condeſcention the weaker might be gained.

And laſtly, Such was the aſſembly of the Apoſtles met together to compoſe the Creed, tho' ſome doubt whether they ever met for that purpoſe; and alſo that meeting wherein 84 Canons were made, which paſs under the name of the Apoſtolical Canons.

Oecumenical or General Councils.

After the Empire became Chriſtian, ſome of the good Emperors thought it requiſite to call all the Biſhops within their Dominions to one univerſal aſſembly, to conſult of proper methods to preſerve unity amongſt Believers, and to defend the Eſtabliſhed Faith, and theſe were called general Councils, of which there were Seven very famous in the Greek or *Eaſtern* Church, and as many in the *Weſtern* Church.

Thoſe of the *Eaſtern* Church were

The first { *Nicene*, *Conſtantinople*, *Epheſus*, Of *Calcedon*, Of *Conſtantinople* the 2d., Of *Conſtantinople* the 3d., *Nicene* the Second } Council.

The firſt *Nicene* Council conſiſted (*n*) of 318 Biſhops; of which old Biſhop *Hoſius* was Preſident, and *Potoman* and *Paphnutius* were his aſſiſtants in this Council; the Hereſie of *Arrius* was condemned, who denied the Son to be coeternal and coeſſential with the Father; and that difference which was between the *Eaſtern* and *Weſtern* Churches about the keeping the Feaſt of *Eaſter*, together with thoſe Schiſmatical Diſputes of the *Meletians*, and of the *Novatian* Hereticks were Condemned; and in this Council the good Emperor burnt all the Accuſations which the Biſhops had wrote againſt each other as unworthy to be ſeen.

Conſtantinople the firſt, A.D. 318.

The firſt Couneil aſſembled at *Conſtantinople* under *Gratian* and *Theodoſius* conſiſted of 150 Biſhops, in which *Cyrill* Biſhop of *Jeruſalem* was Preſident; theſe condemned *Macedonius* for denying the Divinity of the Holy Ghoſt. The Emperor made all confeſſions void, except thoſe wherein Chriſt was acknowledged to be coeſſential with the Father, and this is ſtill retained in our Liturgy, in the *Nicene Creed*, which

(*n*) A. D. 235.

ſome

ſome are of Opinion was compoſed by *Gregory Nazianzen*; but thoſe words (*the Son*) which confirm the Holy Ghoſt to proceed from the Father and the Son were added by Pope *Benedict* the Seventh.

Epheſus 1ſt. A.D.434.] The firſt Council of *Epheſus* was aſſembled under *Theodoſius* the Younger, it conſiſted of 200 Biſhops, of which *Cyrill of Alexandria* was Preſident, it condemned *Neſtorius of Conſtantinople*, who inſtead of two Natures acknowleged divers Perſons in Chriſt, for which he was baniſhed, and afterwards Blaſpheming, his Tongue was eaten with Worms, and ſo he died.

Calcedon.] The Council of *Calcedon* was aſſembled by *Martianus* the Emperor, who was likewiſe Preſident of it, there were 630 Biſhops who condemed the Hereſie of *Eutyches* and *Dioſcorus*, but this laſt was afterwards received into Favour, and *Theodoret*, who in compliance to *Neſtorius*, had condemned the *Anathema* of *Cyrill* of *Alexandria*, was upon his Recantation reſtored to his Biſhoprick.

Conſtantinople 3d, A.D.680.] The third Council of *Conſtantinople* was aſſembled by the Emperor *Conſtantine Pogonatus*, it conſiſted of 150 Biſhops, of which that Emperor was Preſident, in this Council the *Eutychean* Hereſie was condemned, and *Macarius* the chief Promoter of it brought ſeveral falſe Copies of Books to maintain that there was but one Will in Chriſt, which old *Polychronicus* ridiculouſly endeavoured to confirm by a Miracle in raiſing one from the Dead: In this Council 'tis commonly ſaid, that 102 Canons were made but never ratified, becauſe they were added by the Fathers in the *Trullo*, which is a vaulted Cloiſter in the Imperial Palace, and this was above 227 Years after that Council was held.

Two Council of Nice.] The Images, Statues and Relicques which were broken to pieces by *Conſtantine*, *Copronymus* and *Leo Iſaurus* were reſtored by their Son and Grand-ſon *Conſtantine* in the ſecond Council of *Nice* which was held under him, in which 350 Biſhops were aſſembled, and Image-breakers were condemned as Hereticks, this Diſtick is attributed to that Council.

Id deus eſt quod imago docet ſed non deus ipſe,
Hanc videas ſed mente colas quod cernis in ipſa.

There were likewiſe ſeven *Latin* Councils held at *Ariminum*, *Lateran*, *Lyons*, *Vienna*, *Florence*, *Lateran* 2d. and *Trent*.

Ariminum. A. D. 369.] The firſt at *Ariminum* where there 400 Biſhops in this Council, the *Nicene* Creed was ordered punctually to be obſerved.

Lateran.]

Lateran.] The first four *Lateran* are comprehended under one, as more favouring the Popish Dissention than the Doctrine or Discipline of the Church, it is called the *Lateran Council* from the place where it was held, which was formerly the House of *Plautius Lateranus*, who was banished by *Nero*, and *Constantine* the Great gave this House to Pope *Miltiades*, which has continued as a Palace for the Popes ever since.

The first of these Councils was assembled under *H.* 5. where 300 Bishops were present, and here the investiture of Bishops with the *Ring and Staff* was taken from the Emperor and given to the Pope, *Crosses* were also appointed for the War against the Infidels, and those who fought under them had their Sins pardoned.

The second was held under *Lotharius*, *A. D.* 1131. in this there were 2000 Bishops, who made 30 Canons, all published by *Gratian* from the *Vatican* Library, by which some Hereticks were condemned, and all Persons were made guilty of Sacrilege who received Tithes, and so incurr'd the penalty of Damnation, and Usurers were deprived of Christian Burial and curs'd to Hell.

The third was assembled under *Frederick* the First, in which were 300 Bishops, who condemned the *Albigenses* and *Peter Lombard*, and annulled all Ordinations made by Schismaticks.

The fourth was assembled under *Frederick* the second, and consisted of 400 Bishops, who rejected the Book of *Abbot Joachim* again *Peter Lombard*, and condemned the Follies of those who denied Transubstantiation; this Council exacted Money from the Temporal Magistrates to extirpate such whom the Pope had adjudged Hereticks, and granted many Indulgencies to those who went with *Crosses* commanded by *Godfrey of Bulloigne* to recover the Holy Land, and lastly, it prohibited pluralities of Benefices.

The said *Frederick* the second *A.D.* 1244. assembled another Council at *Lyons*, in which he was deposed by *Pope Innocent* the Fourth, who presided there, the fifth of all Ecclesiastical Revenues were given for the recovery of the Holy Land, the Scarlet Hat was given to the Cardinals, and Feasts were instituted for Popish Saints.

The second at *Lyons* was assembled under *Rodolphus*, *A. D.* 1272. in which there were 700 Bishops who compelled *Michael Paleologus* with his Greeks, to subscribe that the Holy Ghost proceeded from the Father and the Son, but returning home they recanted it; This Council sent for *Tho-*

mas Aquinas, but he died in his Journey thither; they gave the tenth of all Eccleſiaſtical Revenues for ſix Years, for the recovery of the Holy Land: Here the bowing at the name of Jeſus was ordered, and in this Council 36 Conſtitutions were made, which are to be found in the ſixth Decretals.

At *Vienna* a Council was held under *H.* 7. in which were 300 Biſhops, who encouraged the Expedition to *Jeruſalem*, and ſuppreſſed the *Knights Templars*, under a pretence that they had murdered the Emperor of the *Abyſſines*, and for that they were Hereticks; but *Trithemius* tells us, the true cauſe was, becauſe they were Rich, and this appears by a Conſtitution they made, that none ſhould enter into that Order, unleſs he firſt ſurrender the Goods of the ejected Templars to be diſpoſed by the Pope.

The Conſtitutions made in this Council are called the *Clementines*, and are a Supplement to the Canon Law, and amongſt the reſt, there is that famous Decree for conſtituting profeſſors of *Hebrew*, *Arabick*, and the *Oriental* Languages at *Oxford* and other Univerſities, to the intent that the *Jews* and *Mahometans* might by this means be the more eaſily converted to the Chriſtian Religion.

Florence. *A. D.* 1431.] The Council at *Florence* was begun at *Ferrara* under the Emperor *Albertus*, but adjourned to *Florence*, in which were 141 Biſhops, and the Pope himſelf was Preſident; they depoſed the Council of *Baſil*, and debated the Articles concerning the proceeding of the Holy Ghoſt, as alſo ſeveral other things concerning Tranſubſtantiation, the adminiſtring unleavened Bread in the Sacrament, the Popes Supremacy, to which all the *Greek Biſhops* and *Doctors* there ſubſcribed, amongſt whom was *John Paleologus* and *Joſeph* the Patriarch.

Lateran 5th, *A. D.* 1512.] The fifth *Lateran* Council was held under *Maximilian* the Firſt, it conſiſted of 114 *Biſhops*, who diſannulled all the Acts of the Council of *Piſa*, and exploded the pragmatick Sanction, which was made in the Council of *Baſil* in defence of the Eccleſiaſtical Liberties againſt the Encroachments and Uſurpations of the Church of *Rome*, the immortality of the Soul was aſſerted, Preachers were prohibited to pervert the Scripture to ſtrange Opinions, and Books were not to be printed without the approbation of learned Men.

Trent.] The Council of *Trent* was aſſembled by the Emperor *Charles* the Fifth, and ſate 18 Years, in this there were 25 Seſſions, in which the ſucceſſive Popes, by their Deputies, were Preſident; for it continued during the Pontificate of

Paul

Paul the 3d, *Julius* the 3d, and *Paul* the 4th, in the Reign of the two firſt of thoſe Popes, Original Sin, Juſtification by Faith, the Sacraments in General, and Baptiſm in Particular; Repentance and Extreme Unction were diſcuſſed, in the Reign of the laſt the Communion of Lay Perſons under one Kind, the Sacrifice of the Maſs, Orders, Matrimony, Purgatory, worſhipping Reliques, invocation of Saints and of Images, Indulgences and other things of this nature were debated and ſettled.

This Council granted ſafe Conduct to three Proteſtants, that they might be preſent there to offer Reaſons for their diſſenting from the Popiſh Religion; but they were not to pretend to reform any thing, but to be inſtructed.

I find by the Writers in thoſe times, that this Aſſembly was never admitted by the *French*, nor very much eſteemed by the more learned Papiſts; it was wholly rejected by *Kemnitius Gentiletus* and *John Calvin*, the learned *Father Paul* has publiſhed the Hiſtory of it, by which it will appear to thoſe who conſult that Hiſtory, that it was an Aſſembly only to impoſe on the Chriſtian Religion, and not to moderate any differences in it, and therefore might well be called a ſacred Deluſion of Chriſtian Princes and Chriſtianity it ſelf.

Controverted Councils.] As to the controverted Councils they are reduced by *Bellarmine*, under a peculiar *Claſſis*, ſome of which were approved, and ſome rejected; ſo that if this diſtinction is admitted, then a Council will be no more than a meer Device of the Pope, to admit and refuſe what he thinks fit under the colour of Religion, but really for eſtabliſhing his Authority and Supremacy.

The controverted Councils are likewiſe Seven; At *Conſtantinople* 4th, *Sardica*, *Syrmia*, *Quiniſext*, *Frankfort*, *Conſtance* and *Baſil*.

Conſtantinople 4th, *A. D.* 870.] That at *Conſtantinople* the 4th was aſſembled under *Baſilius*, it conſiſted of 102 Biſhops, who diſcharged *Photius* the moſt learned Greek Patriarch, and it was either for writing againſt the Uſurpation of the Pope, or for being an Enemy to Images; but tho' this Council beſtowed great Honours on Images, they made one very good Canon, by which they prohibited the uſing popiſh Garments at Comedies or Interludes. There hapned one thing very remarkable in this Council, *viz.* the *Bulgarians* being newly converted to Chriſtianity, could not tell whether they ſhould communicate with the *Eaſtern* or *Weſtern Church*, but by thier Ambaſſadors adviſed with this Council about it; the *Romans* having magnified the Authority of the *Pope*, and

the Ambaſſadors having ſome Encouragement, and being protected by the Emperor, behaved themſelves in a very Proud and Haughty manner towards the Patriach and all the *Greek* Biſhops; but as they returned home they were aſſaulted by the *Sclavonians*, and the authentical Copy of this Council was taken from them, but *Anaſtatius* the famous Library-keeper, who was preſent at it, hath tranſmitted the Remains thereof to Poſterity.

The *Greeks* reject this Council, and *Bellarmine* affirms, that what we have from *Anaſtatius* is Suppoſitious and incertain.

Sardica, *A. D.* 351.] The Council of *Sardica* was aſſembled under *Conſtantius*, in which were 376 Biſhops, of which *Hoſius* was Preſident, 300 of theſe were *Weſtern* Biſhops, who confirmed the *Nicene Creed*, but the other 76 were *Arrians*, who meeting at *Philopopolis* confirmed *Arrianiſm*, and made 21 Canons, but not one concerning the Pope's Supremacy, or Appeals to him from remote Churches.

'Tis true ſome of them do approve Appeals from *Rome*, but only by the Subjects of that Patriarck-ſhip, and even in ſuch caſe they do not approve them as neceſſary but Arbitrary only.

Syrmia, *A. D.* 356.] The Council of *Syrmia*, in which there were 300 Biſhops of the *Weſt* and ſome of the *Eaſt*, was aſſembled to hear and determine the cauſe of *Photinus*, who complained that he was unjuſtly condemned in the Council of *Sardica* for preaching that Chriſt was meer Man, and inferiour to his Mother: In this Council *Hoſius*, who was Preſident of the Council at *Sardica*, and now almoſt an hundred Years old, was compelled by whipping to ſubſcribe to *Arrianiſm*, which as old as he was he recanted before he died.

Quiniſext, *A. D.* 692.] The Council of *Quiniſext* was held under *Juſtinian* the 2d, *Balſamon* and our *Bede* account it Erronious, but becauſe ſome former *Synods* had ratified nothing concerning Eccleſiaſtical Diſcipline: This Council confirmed above one hundred Canons made in the *Trullo*, and becauſe by the 36th Canon the Patriarch of *Conſtantinople* is made equal with him at *Rome*, and by another Marriage was allowed to the Clergy, therefore the *Latins* rejected it, yet ſome of thoſe Canons, as particularly that againſt breaking Images was put in uſe by Pope *Gregory* the 2d, and *Adrian* and *Gratian* tells us that they were all received by the *Nicene Synod*,

Frankford, *A. D.* 794.] 'Tis not agreed whether the Council aſſembled at *Frankford* was a general or a Provincial Council,

Council, ſome vvill have it to be a general Council becauſe it vvas aſſembled by *Charles* the great; but others vvill have it to be Provincial becauſe it condemned Images, and that again is denied by *Binius*, for he tells us that it confirmed the Decrees of the tvvo *Nicene Councils* concerning the Worſhiping Images; it vvas aſſembled to condemn that Hereſie ſpread abroad by the Archbiſhop of *Toledo*, and the Biſhop of *Aurelia*, vvho declared that Chriſt vvas only the adopted Son of God; but the learned Cardinals *Bellarmine* and *Baronius* tells us that vvhat this Council did vvas not much to be regarded.

Conſtance, A. D. 1414.] The Council of *Conſtance* was aſſembled under *Sigiſmond*, in which there were 1000 Biſhops and Doctors to compoſe thoſe Schiſms which had been between the two Popes of *Avignon* and *Rome*; this Council depoſed *John* XXIII. and exalted *Martin* V. to the Popedom; they condemned 45 Articles of *Wickleffe*, and ordered his Body to be taken out of the Grave and Burnt: In one of theſe Articles they tell us that he affirmed, *Deus debet obedire Diabolo*, when in truth it was *Deus dedit obedire Diabolo*; they ordered *John Hus* and *Jerome* of *Prague* to be Burned; they affirmed the Council to be above the Pope; that faith was not to be kept with Hereticks; they denied the Cup to the Laiety, which made the *Bohemians* proteſt againſt them, and declare that they were *Huſſites*, and that they would defend the Law of Chriſt with their Lives and Fortunes.

Bazil.] The Council of *Bazil* was called alſo by *Sigiſmund* the Emperor, of which Cardinal *Julian* was preſident; and in this Council not only Biſhops but other learned men had Votes, which was not permitted by former Councils. Here Pope *Eugenius* was depoſed, and the Duke of *Savoy* who had lived an Hermits Life was advanced to the Popedom, by the name of *Felix* V. They decreed the Council to be above the Pope and all others, and that he could not Diſſolve, Prorogue or Remove it, being once lawfully Aſſembled, and that whoever deny'd this was an Heretick.

But the depoſed Pope aſſembled another Synod at *Ferrara*, which afterwards removed to *Florence*, as hath been already obſerved; and there he ſided with the *Greeks*, and depoſed the Council of *Bazil*; and at the ſame time they of *Bazil* confirmed the *Pragmatick Sanction*, condemned *Nepotiſme*, ſuppreſſed Concubines; preſcribed the means how *Jews* might be converted to Chriſtianity, declared the Bleſſed Virgin to be Immaculate, and granted the Cup to the Laiety; but *Felix* renouncing the Popedom *Eugenius* was ſatisfied and reconciled.

This

This Council was condemned by another assembled under Pope *Leo* X. as Schismatical, but it was commended by *Æneas Sylvius* who was present at it, and afterwards made Pope by the name of *Pius* II. but as soon as he was advanced to that Dignity he changed his former Opinion: However, we are told that there is an undoubted Copy of this Council in the publick Library in *Oxford*.

Rejected Councils.] The Councils which are rejected are those which raised Heretical Opinions, or made any Schisms in the Church; and of these there were likewise Seven in number, At *Antioch*, *Millan*, *Selencia*, *Ephesus*, *Constantinople*, *Pisa*, *Pisa* 2.

Antioch, A. D. 340.] In the Council of *Antioch* the good Bishop *Athanasius* was Banished, but being restored by *Constantius*, this was held unlawful by the *Arians*, because it ought to be done by the same Authority by which he was ejected: the matter was referred to Pope *Julius*, who Summoned a Synod to appear at *Rome*, but *Constantius* being perswaded to be at the Consecration of that magnificient Temple which was Built at *Antioch*, by *Constantine* the great, there met 90 Bishops, of which 30 were *Arians*, and tho' the rest were Orthodox and Voted for the Restoration of *Athanasius*, yet he was condemned by the other with the concurrence of the Emperor.

In this Council a Creed was composed, intermixt with many Errors; and the 25 Canons which were made in it do rather concern the Discipline than the Doctrine of the Church.

Millan, A. D. 355.] The Council of *Millan* was assembled under *Constantine*, it consisted of 300 Bishops, the Emperor himself being president, who accused *Athanasius* in Person; and the *Western* Bishops then present would have consented to the Accusation, if the *Arians* would have subscribed to the *Nicene Creed*, which the chief of them refused to do. Then followed the degrading of Bishops, and several corrupt Ecclesiastical determinations; so that this Council might rather be called an assembly of wicked Persons than a convention of Christians.

Seleucia, A. D. 363.] The Council at *Seleucia* was assembled under the same *Constantine*.

In the Second Council of *Ephesus* there were 128 Bishops, of which *Dioscorus* of *Alexandria* was president; this Council was assembled to condemn the Heresy of *Eutyches*, who affirmed that the Flesh of Christ was not like ours, but fell from Heaven like the Rays of the Sun and pierced the Virgins Womb,

Womb, ſo he denied two natures in Chriſt Incarnate, and affirmed that his Fleſh was changed into a God; but *Dioſcorus* influencing this aſſembly *Eutyches* was abſolved, and thoſe Biſhops who oppoſed it were diſcharged of their Places; and *Flavianus* who was the moſt violent in oppoſing it was trodden to Death, and the reſt Subſcribed very unwillingly, for they were awed by the Soldiers inſomuch, that this was called the Synod of Thieves, and what they did was again undone by the famous Council of *Calcedon*.

Conſtantinople, A. D. 730.] That Council held at *Conſtantinople* under *Leo Iſaurus*, and another held there under *Conſtantius Copronimus* were both rejected; for in both the worſhipping of Images was condemned,

Piſa firſt, A. D. 1409.] The firſt Council of *Piſa* is diſputed whether it ought to be accounted a general Council or not, or whether it ſhould be rejected? *Bellermine* himſelf is very doubtful of this matter; there were preſent in it 23 Cardinals; 3 Patriarchs, 300 Archbiſhops and Biſhops, 28 Abbots and Priors, and a great number of other Divines and Ambaſſadors of Princes, and theſe met to reconcile the Schiſm between the Popes of *Rome* and *Avignon*, that is, between *Benedict* XII. and *Gregory* XIII. who both aſſumed the Title of Popes at the ſame time, and were both depoſed by this Council, and *Alexander* VIII. advanced to the Popedom. But this was rejected as an aſſembly without an Head, becauſe it was called by the Cardinals in a Tumultuous manner, againſt the Pope's Authority, although that Authority could not well be had at that time, becauſe there were Two who claimed a Right to it.

Piſa ſecond.] The other was held at *Piſa* under *Maximilian* and the King of *France*, where ſeveral Cardinals met, who ſummoned Pope *Julius* to attend them, but he ſo little regarded their ſummons that he Excommunicated them and the *French* King; and having called an *Anti-Synod* in the *Lateran* Pallace, the Cardinals and Biſhops of his Party met there, where having made ſome Excuſes for himſelf in not calling a Synod before that time, he ſoon after Died, and *Leo* X. ſucceeded, who continued that *Lateran* Council, and made ſeveral Decrees in it, to which the Cardinals at *Piſa*, ſubmitted, but the *French* King refuſed, and in contempt of their Authority Coined Money with this Inſcription, *perdam Babylonem*. This Council is likewiſe rejected by the Pope, becauſe it was called in an inſolent manner by his Cardinals, and againſt his Authority.

National

National Synods.] I ſhall now add a few things concerning *National Synods*, vvhich comprehends the provincial Biſhop of every Archbiſhops; theſe are not of that univerſal Authority as general Councils are, for their decrees are not binding out of their Limits; but if conformable to Scripture, and confirmed by general Councils, they are in force every vvhere.

Theſe *National Synods* are Seven in number, *African*, *Britain*, *Eaſtern*, *French*, *German*, *Italian* and *Spaniſh* National Councils.

African Councils.] The *African* Councils were almoſt 20, of which 15 were held at *Carthage*, and amongſt them the ſixth is worthy of Obſervation, by which the ſubtilties of the Pope were diſcovered in obtruding a ſuppoſitious Canon of the *Nicene Council*, for receiving Appeals in the Synod of *Melivitis Pelagianiſme* was confuted; and in the Synod of *Hippo* the Canons of other Synods were collected.

Britiſh Councils.] Amongſt the *Britiſh* Councils the moſt famous were held at *Wincheſter* under King *Edgar*, the Archbiſhop *Dunſtan* then preſent, where a Wooden Croſs gave a Vote againſt the Marriage of Prieſts, if we believe the Monks who report this Story.

Another at *Oxford* under *Stephen Langton*, who divided the Bible into Chapters: Another at *Clarendon* under *Hen.* 2. in which *John* of *Oxford* was Preſident; in this Council 16 Conſtitutions were made, which the Romaniſts condemn.

Eaſtern Councils.] Under the *Eaſtern* Councils the *Græcian* are comprehended. At *Conſtantinople* there were Thirty three; that at *Aneyra* determined the receiving and rejecting thoſe who fell away; that at *Leodecea* debated the worſhipping of Angels; that at *Gangra* was aſſembled about the reformation of manners, and in the *Tyrian* Council *Athanaſius* was troubled and diſcharged.

French Councils.] In *France* there were held 13 Councils; in all which Sacrilege and Sacrilegious Perſons were Condemned. At *Arles* the Clergy were directed what Diſcipline to obſerve in the Church.

German Councils.] In *Germany* there were 9 Synods held at *Cologne*; one in *Bavaria* concerning the Sabbath; one at *Wormes* concerning decency in Eccleſiaſtical affairs; one at *Mentz* concerning Eccleſiaſtical Immunities, another held there againſt *Godelſcalchus*, and in this Prayers were enjoined for the Emperor and Empreſs, and the good eſtate of Chriſtianity; at *Aquigrane* there was another concerning Eccleſiaſtical Orders; at *Erford* another concerning Feaſt Days, another at *Dort* againſt the *Remonſtrants* and *Socinians*.

Italian Councils.] In *Italy* there were 115 ſuch Synods, amongſt which we muſt reckon thoſe the chief which were aſſembled about the celebration of the Feaſt of *Eaſter*; thoſe who received penitent Apoſtates into the Communion of the Church, which the *Novatians* always refuſed; that aſſembled under Pope *Gelaſius* of 70 Biſhops, wherein the *Index Expurgatorius* was compoſed, and the Canon Law tranſmitted to Poſterity; the *Simceſſan* Council in which Pope *Marcellinus* was condemned for Sacrificing to Idols; that aſſembled by Pope *John* XXIII. to Crown the Emperor *Sigiſmund*, but the Solemnity was ſpoiled by the frequent appearance of an Owl in the aſſembly; that at *Papia* which excommunicated the Pope who had excommunicated the Emperor; and that at *Brixia* who depoſed the famous Pope *Hildebrand*.

Spaniſh Councils.] Of the *Spaniſh* Councils there were 25 held at *Toledo*, in which many things were religiouſly decreed, and chiefly againſt the *Priſcillianiſts*; in that at *Eliberis* there were 81 Canons made, by which the *Priſcillianiſts* were likewiſe condemned; in that at *Cæſar Auguſta* it was ordered that no Man ſhould aſſume the title of a Doctor unleſs he had taken his degree; in that at *Lerida* Marriage was prohibited in *Lent*; in that at *Bracara* the *Manichees* and the *Priſcillianiſts* were condemned; in that at *Matiſcon* the Vices of the Clergy were Reformed, and the payment of Tythes urged; in that at *Hiſpalis* the conſecration of a Presbyter, by a Presbyter, is condemned.

Beſides theſe aſſemblies there have been ſeveral publick and ſolemn meetings of Divines, which may properly be called Eccleſiaſtical conferrences; ſome of which have been aſſembled by Authority, and ſome were arbitrary and voluntary Meetings:

Thoſe aſſembled by Authority were held at *Marpurge*, *Spira*, *Smalchald*, *Intermiſtican*, *Altenberg*, *Torge*, *Hetzburg*; the meetings at theſe places were to compoſe the differences amongſt Diſſenting Brethren.

At *Wormes*, *Ratisbone*, *Poſſiace*, St. *Germans*, *Mompillier*, *Oxford*, *London*; theſe were meetings of Roman Catholicks.

At *Malburne Wittenberg*, *Franckford*, By *Lutherans Calviniſts*, *Zwinglians* and *Anabaptiſts*. *Remonſtrants*, at the *Hague*.

Antitrinitarians, *Diſciplinarians*, at *Geneva*.

Upon the whole matter it has been obſerved by ſome of our * Divines, that nothing more expoſed the Chriſtian Religion than the violence, paſſion, mallice and oppreſſion which

* *Wake's* Authority of Chriſtian Princes, *fo.* 307.

prevailed

prevailed in thoſe Councils held by *Conſtantine* the firſt, and other ſucceeding Emperors, upon the occaſion of the *Arrian* controverſie.

Curates.

SINCE in ſome Caſes Pluralities are allowed, which muſt neceſſarily imply *non-reſidence* upon one of the two Benifices, 'tis requiſite that a Clergyman in ſuch caſe, or if he is old or infirm, ſhould have a Curate to ſupply one of his Cures.

The common uſage is, that Licences are granted by Chancellors of the Dioceſs, and taken (as the Biſhop of *Worceſter* obſerves) in the ſame manner as St. *Peter* took the Fiſh, which firſt came with Money in it's Mouth; but this is not only contrary to the Canon, but may be a great inconvenience to the Church in general, for when ſo little care is taken, the People may have a weak and inſufficient Perſon ſet over them.

Therefore the (*a*) Canon prohibits Curates to ſerve in any place without examination and admiſſion by the Biſhop of the Dioceſs, under his Hand and Seal, or by the Ordinary, having Epiſcopal Juriſdiction; ſo that the Law requires the approbation of the Biſhop to the admiſſion of a Curate, and no Incumbent ought to take one without it.

Tis true, many Licences are granted without the Biſhops Hand and Seal, which, tho' not void, are irregular, becauſe expreſly againſt the Canon.

Now, 'tis not only neceſſary in reſpect to the Church, that the Curate ſhould be allowed by the Biſhop, who 'tis preſumed will approve no other than a Perſon of tolerable abilities to officiate in the Holy Function, but 'tis convenient for the Curate himſelf, for when he hath the approbation of the Biſhop, he uſually appoints the Sallary too, and in ſuch caſe if there ſhould be any neglect of payment, the Curate hath a proper remedy in the Eccleſiaſtical Court, by a Sequeſtration of the profits of the Benefice; but if he hath only a Licence without the Biſhop's Hand and Seal, then if his Wages ſhould not be paid he muſt bring an Action at Common Law againſt the Incumbent, in which there are ſome niceties which are not required in the other Caſe; as firſt, he muſt prove the agreement; he muſt likewiſe prove that he Subſcribed the Declaration according to the (*) Act of Uniformity; for 'tis

(*a*) Canon 48. (*) 14 *Car.* 2. cap. 4.

expreſly required by that Act that every Curate ſhall do it, or be *ipſo facto*, deprived of his Curates place.

Theſe are the remedies which he hath for his Sallary, but before the Statute 29 *Car.* 2. he hath nothing to do with the Tythes themſelves, and therefore payment to the Curate was no good diſcharge againſt the Impropriator, not for the reaſon given by (*a*) Mr. *Noy*, *viz.* That a Curate cannot preſcribe againſt his Maſter, becauſe he may remove him at pleaſure, which I deny, for if he is Licenſed by the Biſhop as he ought, he cannot be removed without his conſent, but the reaſon is, becauſe he hath a right only to a Sallary or Penſion, which may be recovered as abovementioned.

I admit that he hath no fixed Eſtate in his Curacy, but that the Biſhop may remove him at pleaſure without any formal Proceſs at Law, tho' the Incumbent cannot; but this is ſeldom done, eſpecially where the Curates are ſuch who are called *perpetual Curates*; for, as where the Tythes were *appropriate*, there were *Vicars* called *perpetual*, who were not endowed, but had only *congruam portionem* allowed them by the Biſhop; ſo where the Tythes were *impropriate* and no Vicarige endowed, as they are in many places in *England*, the Lay impropriator is bound to maintain a Curate to perform Divine Offices, who is called a *perpetual Curate*.

'Tis true, he is no ſole Corporation, and therefore cannot take any benefit of a Deviſe to him by that name; but if an impropriator ſhould deviſe a certain portion of Tythes to him and to all that ſhall ſerve the Cure after him, tho' the Curate is incapable of taking by ſuch a Deviſe for the reaſon abovementioned, and for that he hath no Succeſſion, yet a (*b*) Court of Equity hath decreed that the Heir of the Deviſor ſhall be ſeiſed in truſt for the Curate, for the time being.

It hath been obſerved before, that when the Biſhop approves the Curate, he uſually appoints his Sallary, which he might alter or increaſe as he ſaw occaſion; but this muſt be underſtood to be before the Statute for (*) augmenting Vicaridges and Curacies, for ſince that Statute theſe *perpetual Curates* have a more fixed and eſtabliſhed right to their Sallaries; for many Eccleſiaſtical Perſons and others, ſince the Reſtoration have, upon renewing their Leaſes of Tythes, reſerved more than the ancient Rents on purpoſe, that the ſame might be applied to improve poor Vicaridges and Curacies.

But becauſe ſuch augmented Rent was not in ſome Leaſes made payable to the Vicars and Curates themſelves, therefore

(*a*) Noy 15. (*b*) 2 Vent. 349. (*) 29 *Car.* 2. cap. 8.

the

the Statute provides that as well when 'tis made ſo payable as where 'tis reſerved by way of encreaſe to the Leſſors, but intended for the benefit of the Vicar or Curate, that it ſhall continue during the Leaſe and afterwards, in whoſe hands ſoever the ſaid Tythes ſhall be, and they ſhall be chargeable therewith whether the ſame is reſerved again or not:

For, by that Statute the Curates are declared to be in the actual poſſeſſion of ſuch augmented Rents, for the uſe of themſelves and their Succeſſors, and may diſtrein or have an Action of Debt to recover the ſame, ſo that they have a right by this Statute to ſuch Salary, and cannot be deprived of it at the pleaſure of the Biſhop, tho' the Curate is Licenſed *ad noſtrum duntaxet bene placitum duraturum*. Therefore, like other incumbents, they muſt be deprived by due courſe of Law.

It hath been a queſtion whether the Executors of a Curate may be ſued in the Spiritual Court for dilapidations; ſome are of opinion that they cannot, becauſe he is not properly an Incumbent; for he doth not come in by inſtitution and induction, and therefore is not to be charged himſelf, nor thoſe who repreſent him.

Cure of Souls.

WHEN Chriſtianity was firſt Planted in this Nation, the Biſhops were conſtantly reſident at their Cathedrals, and had ſeveral Clergy-men attending them at that place, whom they ſent to preach and convert the People, where there was the greateſt probability of ſucceſs, and the Perſons thus ſent either returned or continued in thoſe places, as occaſion required, having no fixed cures or titles to particular Places; for being all entred in the Biſhops Regiſtry (as the uſual courſe then was) they could not be diſcharged without his conſent.

Afterwards, when Chriſtianity prevailed, and many Churches were built, the cure of Souls was limited both as to Places and Perſons.

The places are thoſe which we now call Pariſhes, the extent whereof is certainly known, and the boundaries are now fixed by long Uſage and Cuſtom.

The Perſons are the Miniſters, who by Preſentation, Inſtitution and Induction, are entituled to the Tythes and other Eccleſiaſtical Profits ariſing within that Pariſh, and have the cure of Souls who live and reſide there, and this the Canoniſts call a Cure *in foro interiori tantum*, and they diſtinguiſh it from a cure of Souls *in foro exteriori*, ſuch as

Archdeacons have to Suſpend, Excommunicate, and Abſolve, and which is *ſine paſtorali cura*, and from another Cure which they ſay is *in utroque ſimul*, that is both *in exteriori & interiori foro*, and ſuch the Biſhop hath, who hath a ſuperintendant care over the whole Dioceſs intermixed with Juriſdiction.

It hath been obſerved by a late learned Prelate, that ſome People are againſt theſe Cures which are thus limited to Pariſhes, becauſe they have no manner of reſemblance to the firſt gathering of Churches before the Nation was divided into Pariſhes; for before that time, as it hath been already obſerved, the Biſhop and his Clergy lived in Common, and they had liberty of Preaching where ever they were ſent or called.

But he tells us, the ſame Argument may be uſed againſt Dominion and Property, becauſe 'tis not agreeable to the natural ſtate of Community; for Mankind by an Original and natural Right, had a freedom to poſſeſs themſelves of any thing which they thought convenient for their Uſe; but upon encreaſe of the People great inconveniencies attended this State of Nature, and then Property came to be eſtabliſhed by Diviſion, which was found to be ſo abſolutely neceſſary for the publick Good, that it was not only continued in all ſubſequent Ages, but ſtrengthned by Laws and Civil Sanctions, in order to puniſh thoſe who invaded the ſeparate Rights of another either by force or ſtealth.

And the caſe is the ſame in reſpect to *cure of Souls*; for upon the encreaſe of Chriſtianity there being many inconveniencies found in an unſettled and ambulatory Clergy, the People being at a great incertainty where to go in order to hear Divine Service, and to partake of the Sacraments, when Churches were built and liberally endowed by our Anceſtors, it was then thought neceſſary to fix a Presbyter in a certain and determinate place to take charge of the cure of Souls within that particular Diſtrict, where thoſe of his Pariſh might attend the Service of God, and have help and direction in their Spiritual Affairs.

Cuſtom.

'TIS for the the publick Good and Peace of Mankind, that a time ſhould be limited for all Perſons to claim their Right and be excluded for their Neglect, for otherwiſe Men might be diſturbed in theie Poſſeſſions after many Years quiet

quiet Enjoyment, when there is no poſſibility either of defending or proving their Right.

Therefore with us here in *England* an immemorial Cuſtom hath the force of a Law, and Mens Rights are eſtabliſhed by long and uninterrupted Poſſeſſions.

Such a Cuſtom is called by my Lord *Coke* one of the Triangles of the Law, but I think, in this, he ſpoke more like a Mathematician than a Lawyer, for 'tis generally agreed amongſt Men of that Profeſſion, that Cuſtom is the Foundation of the common Law.

The learned *Biſhop of Worceſter* gives an account of ſeveral Eccleſiaſtical Conſtitutions which are thus founded on Cuſtom, and by conſequence are now become part of the Laws of the Land, ſuch is the dividing the National Church into two Provinces, and fixing an Archbiſhop in each, with a Metropolitical Power and Authority over all Eccleſiaſtical Perſons and things in each Province.

Such is the ordinary Juriſdiction of every Biſhop over the Clergy in his proper Dioceſs, which ſome think to be as ancient as Chriſtianity it ſelf, for as ſoon as Churches were built and planted in this Nation Biſhops were placed over them, and the Clergy who officiated in thoſe Churches were accountable to their Spiritual Governors at every Viſitation, both for their Living and Behaviour; and the Biſhops who were then the only Viſitors, might proceed againſt them for any contempt of their Authority, or for their Misbehaviour in their ſeveral places.

Such was alſo the delegated Juriſdiction which is lodged in the Officers of Eccleſiaſtical Courts, and the manner of proceedings therein.

And laſtly, Such is the ſettling the boundaries of Pariſhes, for this was not done by the Legiſlative Power, or by any particular Law at once, but it was begun, continued, and fixed according as Men found it convenient in reſpect to Places, and as ſuch Diviſions ſeemed juſt and reaſonable to carry on the Purpoſes for which they were originally deſigned.

As for Cuſtoms of Tything, I ſhall treat of them under the Title Tythes in the word Cuſtom.

Deacon.

I do not intend to treat of the Original of a Deacon, which is as ancient as the time wherein the Apoſtles lived, and ſo is the antiquity of a Deaconeſs.

But I ſhall take notice of him as the third order of the Clergy, and that he was anciently Ordained in a different manner from the Presbyters; for a Deacon might be Ordained by a Biſhop alone, without the aſſiſtance of any Presbyters, and when Ordained, his Office was to take care of the Ornaments and Utenſils of the Church, to receive the Oblations of the People, to diſtribute the Bread and Wine to the Communicants, to read the Goſpels in ſome Churches, and to Baptize in ſome Places, and to Preach, but not without leave of the Biſhop.

This Office is a ſtep towards the Miniſtry, and ſo it was reputed by the Ancient Fathers, and practiſed in the Primitive Church; for to them it ſeemed neceſſary that a Deacon ſhould be a Probationer for ſome time before he was admitted into Prieſts Orders, which was uſually for the ſpace of a Year, and therefore a Man was to be ordained Deacon at twenty three years of Age, and afterwards a Prieſt at twenty four, not that it was ever accounted of abſolute Neceſſity there ſhould be the interval of a Year between the conferring theſe Orders, for by Canon 32, if the Biſhop ſhall find good Cauſe to the contrary, a Deacon may be admitted into Holy Orders within that time, but regularly it ought to be a Year, and with great Reaſon, becauſe in that time it may appear, whether the Perſon is fit to have the cure of Souls entirely committed to his Charge: But by the ſame Canon 'tis expreſly provided that a Biſhop ſhall not make the ſame Perſon both a Deacon and a Prieſt in one Day.

'Tis true, the Qualification for both theſe Offices is the ſame, but there is ſome difference in reſpect to their Age, for a Deacon may have a Diſpenſation for entring into Orders before he is twenty three Years Old, and 'tis diſcretionary in the Biſhop to admit him to that Order at what time he thinks fit; but regularly there can be no Faculty or Diſpenſation for entring into Prieſts Orders before twenty four, tho' this is likewiſe done *Anno currente* as they call it.

As in the Primitive Times, a Deacon was to read the Goſpels; ſo with us his Office conſiſts in reading Divine Service, catechizing Children, baptizing Infants, Burying, Marrying; and before the Act of Uniformity he might be incumbent on a Living with Cure, but not ſince; and the very Form of ordering Deacons, expreſly mentions, that 'tis his Office to aſſiſt the Prieſt in the diſtribution of the *Holy Communion*, and from hence a Queſtion hath ariſen, (*viz.*) that ſince by the Statute 14 *Car.* 2. thoſe who are not Prieſts by Epiſcopal Ordination, are prohibited to adminiſter the Sacrament

crament of the Lord's Supper under the penalty of 100 *l.* one Moiety to the Queen, the other to be divided between the Poor of the place and the Proſecutor; whether a Deacon doth not incur that penalty by diſtributing *Wine* to the Communicants; But I think the bare Act of giving the Cup to them, without conſecrating the Wine, doth not make him an Offender within this Law, becauſe the Prohibition is, that no Perſon ſhall preſume to *Conſecrate* and adminiſter the Sacrament, *&c.* which words comprehend the whole ſolemnity of the Communion.

Dean and *Chapter.*

A *Dean* is an Eccleſiaſtical Magiſtrate, who is next, in Degree, to the Biſhop, he is chief of the *Chapter*, and is called a *Dean*, becauſe he formerly preſided over ten Prebends or Canons, he is by our Law a ſole Corporation, that is, he repreſents a whole Succeſſion, and is capable of taking an Eſtate as Dean, and of conveying it to his Succeſſors, and therefore if Lands are given to him, the Inheritance paſſes without the word *Succeſſors*, becauſe in conſtruction of Law, ſuch Bodies never die.

But *Chapters* are not capable to take by Purchaſe or Gift without the *Dean*, * yet if a Biſhop maketh a Leaſe reſerving Rent, and there is a Proviſo, that in the vacancy of the *See*, the Rent ſhall be paid to the *Chapter in jure ſuo proprio* this is good, for they are Perſons of which the Law takes notice, and are capable to receive Rent, tho' it may be a queſtion whether in their own right or not.

As to his Original 'tis thus;

'Tis certain that Eccleſiaſtical bodies of Men did anciently reſide with the Biſhop in his Cathedral, tho' not under the denomination of *Dean and Chapter*, and thoſe Men were part of his Family, and when he died they choſe another in his room, but they had no peculiar Juriſdiction in the *Saxon times.*

Afterwards, when they got poſſeſſions by the endowment of Biſhops and others, then theſe Perſons aſſumed names of Dignity, and obtained peculiar Juriſdictions, and ſo were called *Prior and Convent*, and when *H.* 8. transferred them to *Dean and Chapter*, the legal Rights which they had remained ſtill, and they became a *Chapter to the Biſhop.*

* Moor 52.

'Tis

'Tis true, they might ſurrender their Lands, but they could not diſſolve their Corporation, and this appears by the caſe of the (a) Dean and Chapter of *Norwich*, who conveyed all their Lands to *Ed.* 6. and he by Letters-patents incorporated them by the name of the *Dean and Chapter of Trinity Church in Norwich ex fundatione Ed.* 6. and regranted their Lands to them, then they made a Leaſe by their old Name, leaving out thoſe words *ex fundatiane Ed.* 6. and adjudged that the Leaſe was good, becauſe the Corporation was not diſſolved by the conveying all their Lands, for tho' they had none, they might ſtill exerciſe Juriſdiction in confirming Leaſes, *&c.*

There are now three, but formerly there were four ſorts of Deans.

(1.) The firſt is a Dean, who hath a Chapter as moſt Deans of Cathedrals have, but there are ſome Cathedrals which never had a Dean, as that of St. *David* and *Landaff*, where the Biſhop is Head of the *Chapter*, and in his abſence the Archdeacon.

(2.) There is another Dean without a Chapter, and not ſubject to the Biſhop's Viſitation, but hath a peculiar Court, in which he hath Eccleſiaſtical Juriſdiction, and ſuch is the *Dean of Battell* in *Suſſex*, who is preſentable by the Lord *Viſcount Mountague*, and comes in by inſtitution of the *Biſhop of Chicheſter*, and by Induction, as other Incumbents.

(3.) There is another Dean who is not preſentable but donative; he hath alſo a peculiar Court, and Juriſdiction within his limits; this Dean is conſtituted by Commiſſion from the Archbiſhop of *Canterbury*, and ſuch is the *Dean of the Arches*, the *Dean of Bocking*, *&c.*

(4.) And there was another called *Decanus Chriſtianitatis*, or a rural Dean, who had no Judicial Power, but was only a ſubſtitute to the Biſhop in granting Adminiſtrations and probates of Wills; but his Office is now devolved on the Archdeacon and on the Chancellor, who generally execute their Authority throughout the whole Dioceſs.

In the next place, I ſhall obſerve who may be made a Dean and who not, and in what manner he is made.

Before the Act of Uniformity Laymen were made Deans, as the *Dean of Durham*, but it was not common, and it was for this reaſon that ſome Men were of Opinion, that a Deanry was not a Spiritual Promotion; but now no Man is capable of that *Dignity* but a Clergy-man.

(a) 2 And 167.

For

For a Dignity it is, becauſe he hath a Juriſdiction, and therefore a Writ brought againſt him as *Dean* is good without his proper Name, and we have my Lord *Coke*'s word for it, (*b*) that a *Deanry* is a *Benefice with cure of Souls*; and that it had been comprehended under that name in the Statute 21 *H.* 8. *cap.* 13. if it had not been for a Special Proviſo in that Act, by which 'tis declared that it ſhall not.

'Tis probable this Proviſo was inſerted, becauſe at Common Law, if a Man had a Benefice, his Acceptance of a Deanry had made his Benefice void; but I am certain that the Authorities cited by my Lord *Coke* in the Margent of his third *Inſtitutes* (*c*) do not warrant it.

For in the year Book 9 *Ed.* 3. 22. there was a *Quare Impedit* brought by the King againſt the *Biſhop of Norwich* for diſturbing him to preſent to the *Deanry of Norwich*, and declares that it was a *Benefice with cure of Souls*; but that doth not prove it to be ſo.

Anno 10 *Ed.* 3. 1. There is the like Declaration, but no Judgment in either.

Anno 29 *Ed.* 3. 44. And in the *Regiſter* 58, there is not a word to this purpoſe.

Then as to the Patronage of a Deanry (*d*) if 'tis of *Canterbury* or *York*, it formerly belonged of common right to the Archbiſhops to preſent upon an Avoidance, but by compoſition the Dean may be elective by the Chapter.

The ancient Deans were elected in the ſame manner as Biſhops (*viz.*) by a *conge de eſlier* granted to the *Chapter* to chooſe, *&c.* and thus the Deans of *York* and St. *Pauls* are Elected; but ſuch Deanries which were tranſlated from *Priories and Convents*, and were made donative after the Statute of Diſſolution, *&c.* are now in the gift of the Queen, and the Deans are inſtalled by her Letters-patents without Election or Confirmation; and ſuch are the Deans of *Canterbury*, *Carliſle*, *Durham*, *Ely*, *Norwich*, *Rocheſter*, *Wincheſter*, and *Worceſter*, &c.

Chapter.] The Chapter conſiſts of *Prebends or Canons*, which are ſome of the chief Men of the Church, and therefore are called *Capita Eccleſiæ*, theſe, with the *Dean*, are the Biſhop's Council, with whom he may conſult in Eccleſiaſtical Affairs.

They are a Spiritual Corporation aggregate, which they cannot ſurrender without the leave of the Biſhop, becauſe he hath an Intereſt in them, they may Sue and be ſued; and if they commence an Action, the Defendant may challenge

(*b*) 3 Inſt. 155. (*c*) 3 Inſt. 155. (*d*) 2 Rol. Abr. 345.

any

any Jury-man who is of Kindred to a Prebendary, one of their own body.

They, with the Dean, are to conſent to every Grant made by the Biſhop in order to bind his Succeſſors, for the Law did not judge it reaſonable to place that Authority in the Biſhop alone.

They are Guardians of the Spiritualties during the vacancy of an Archbiſhoprick, and they have Power as ſuch by vertue of the Statute 25 *H.* 8. *cap.* 21. to grant *Diſpenſations.*

And as a Corporation they have Power to make Leaſes, but they muſt take care to name themſelves right in ſuch Leaſes, for otherwiſe they will be void; as for inſtance, if they are incorporated by the name of the (*e*) Dean and Chapter of the College of St. *Mary of Eaton*, and they make a a Leaſe by the name of the Dean and Chapter of the *College of Eaton*, this is void.

One Biſhop may have two Chapters, as the Biſhop of *Waterford*, who had the *Biſhoprick* and *Chapter of Liſmore* united to that of *Waterford* in the Reign of *H.* 3. now tho' 'tis regularly true, that in ſuch caſe both Chapters ſhould confirm the Biſhops Leaſes, (*f*) yet becauſe ſince the Union they had ſeverally confirmed Leaſes, ſuch uſage makes the Confirmation by one of the Chapters Good.

So where a Parſonage in the Dioceſs of *Winchester* (*g*) was annexed to a *Prebend of Salisbury*, and the Prebendary made a Leaſe of it for 99 Years, which was confirmed by the Biſhop, Dean and Chapter of *Salisbury*, this was held good without the Confirmation of the Dean and Chapter of *Winton.*

Defamation.

THIS is when a Man ſpeaks reproachfully of another, with an intent to take away his Reputation, and 'tis an Offence of which the Spiritual Court hath Juriſdiction to puniſh the delinquent in order to reform his manners.

By the Civil Law the Proſecution in ſuch Caſe was left to the choice of the Perſon defamed, who might bring an Action againſt the Offender *proprivato intereſſe*, and ſo take ſome ſatisfaction for the injury done by way of pecuniary Puniſhment.

(*e*) Morn 13. (*f*) 12 Rep. 71. (*g*) Cro. Eliz. 587.

But

But that Law requires that the Suit ſhould be commenced within a Year after the words ſpoken, unleſs beyond Sea, and if ſo, than within a Year after his return.

If the Proſecution is not at Common Law but in the Spiritual Court, then the Libel is brought *ad vindictam publicam & pro ſalute animæ*, and not for any recompence by Damages, for it is to bring the Offender to Diſgrace by open Pennance; but even in that caſe 'tis often commuted for Money, and ſo the injured Party hath no manner of recompence, only he hath his Coſts *pro expenſis litis*.

It would be an endleſs work to run through all the Caſes which are diſperſed in our Books relating to this matter, therefore I ſhall only ſay, that where defamatory words are puniſhable in the Spiritual Court they muſt have theſe Incidents.

The ſubject matter (*b*) concerning which the words were ſpoken muſt be ſuch which is properly determinable in that Court, as to call a Man Adulterer, Whoremonger, Heretick, Schiſmatick, *&c.*

Therefore it muſt be merely Spiritual and not mixed with any thing that is of temporal Cognizance, for then the Courts of Common Law will prohibit the Eccleſiaſtical Judges.

After a Sentence in the Spiritul Court (*i*) in a Cauſe of Defamation, and Coſts taxed, the Party brought an Appeal and then obtained a Pardon; and upon a motion for a Prohibition it was held, that the Pardon was good either before or after the Libel brought, becauſe the Suit was only *pro reformatione morum*, and ſo it is where 'tis *pro ſalute animæ*, but the Coſts are not pardoned, neither hath ſuch a pardon any force where the Party hath an intereſt in the Suit.

Delegates.

THE ſame Statute which prohibits Appeals to *Rome*, doth provide, that if Juſtice ſhould not be done in the Archbiſhops Court, it ſhall be lawful for the Party to Appeal to the Queen in Chancery, which before this Statute was uſually made to the Pope, and thereupon the Lord Chancellor iſſues a Commiſſion under the Great Seal directed to an equal number of Civilians and Lawyers, who are to determine all Eccleſiaſtical Cauſes upon ſuch Appeals, and becauſe theſe Commiſſioners are appointed or delegated by the Queen's Writ, therefore they are called a Court of *Delegates*.

(*b*) 4 Rep. 20. (*i*) 5 Rep. 51.

But

But ſuch Appeals muſt be from a Sentence given in the Eccleſiaſtical Court by the Archbiſhop, or his Official, either.

(1.) In the Court of the Archbiſhop;

(2.) Or in a peculiar;

(3.) Or from a Sentence in the Court of Admiralty.

In all theſe Caſes the Lord Chancellor may grant a Commiſſion of courſe; but if the Sentence is by vertue of a general Commiſſion from the Queen, then there lies no Appeal to Her in (*u*) Chancery, but it muſt be to Her generally, as ſupreme Head of the Church, and this muſt be under Her Sign *Manual*, before the Lord Chancellor can iſſue out a Commiſſion of Delegates.

Deprivation.

THIS is where a Man is made incapable of holding a Benefice by ſome Judicial Sentence in the Spiritual Court, which muſt be pronounced by the Biſhop himſelf, and this is expreſly required by the (*x*) Canon. Deprivation may alſo be by a particular Clauſe in ſome Act of Parliament, but in the laſt Caſe 'tis provided by the Statute 13 *Eliz. cap.* 12. that no Title to preſent by Laps ſhall accrew upon any Deprivation *ipſo facto*, but after Six Months notice given by the Ordinary to the Patron.

The Canon allows many cauſes of Deprivation; but thoſe which are allowed by our Law may be reduced to theſe Particulars,

(1.) *Incapacity.*

(2.) *Contempt.*

(3.) *Crime.*

Under one of theſe particulars all the following Clauſes of Deprivation are comprehended.

Adultery, See *Incontinency.* A Parſon was deprived for Adultery, and afterwards by a general Pardon Adultery was Pardoned; this reſtored him to his Benefice without any Sentence; declaring the Deprivation void, *6 Rep.* 13. *Latch* 22.

Articles of Religion. Not Reading them within two Months after induction, and in ſuch caſe if there ſhould be a general Pardon that will not reſtore him, but it extends only to Offences, for which an Indictment lies; but this neglect is not puniſhable in ſuch a nature, bnt with the loſs of his Living;

Not ſubſcribing them upon taking a Second Living makes the firſt void, without a declaratory Sentence.

(*u*) 2 Roll. Abr. 223. (*x*) Can. 122.

Wilfully

Willfully maintaining any Doctrine againſt them, but notice is neceſſary to be given to the Patron, otherwiſe the (y) Biſhop cannot collate by Lapſe.

Atheiſm.

Baſtardy.

Canons. Nonconformity to them.

Common Prayer. Refuſing to uſe it is (z) Deprivation *ipſo facto*; Preaching in derogation of it; not Reading it within Two Months after induction. 19 *Car.* 2. *cap.* 4.

Dilapidation. 'Tis the opinion of (a) my Lord *Coke*, that Dilapidation is a good cauſe of Deprivation, but the Authorities which he hath cited in the Margent of his Book do not prove it; and 'tis probable that his opinion might induce the Biſhop of *Worceſter* to tell us that thoſe Authorities did not only ſhew what the Eccleſiaſtical Law then was, but that Dilapidations were allowed by the Common Law to be a ſufficient cauſe of Deprivation.

Now, the Caſes cited by my Lord *Coke* are theſe, *viz.* 2 *Hen.* 43. but that was only the opinion of Serj. *Tyrrwhit*; for the chief Juſtice *Thirning* being of opinion that if a Biſhop or Archdeacon commited waſte in cutting the Wood, which they had in right of the Church, they were not puniſhable at Common Law, and if ſo, he demanded of thoſe at the Bar how they ſhould be puniſhed; and I find Serj. *Tyrrwhit* anſwered, that they ſhould be deprived.

In 9 *Edw.* 4. 34. Juſtice *Moile* held, that if the Son gave an Abbot 10*l.* to pray for the Soul of his Father, and he ſhould ſpend the Money, yet he ſhould not be deprived, becauſe it was a Gift which he received *in jure proprio*; but if he had aliened any of the Abby Lands, he might be deprived for thoſe he had in *jure Domus.*

In 29 *Edw.* 3. *fol.* 16. There is not a word to the purpoſe; nor in *More* 917. which is cited by the Biſhop of *Worceſter*, *fo.* 61.

Drunkenneſs, *ad potus equales.* After Admonition, by the (b) 78 Canon, a Clergy-man is not to go into any Tavern or Alehouſe but for his honeſt neceſſities. I find but one inſtance in our Books of a Clergy-man deprived for Drunkenneſs, and that was *Anno* 8 *Jac.* it was *Parker*'s Caſe, and he could never get a prohibition.

Excommunicated. For 40 days.

Forgery.

(y) 13 Eliz. cap. 12. 6 Rep. 23. 1 And. 136. Dyer 369. (z) 1 Eliz. cap. 2. 5 Rep. *Cawdrie's* Caſe. (a) 3 Inſt. 204. (b) 1 Brownl. 70. 2 Brownl. 37.

Hereſie.

Hereſie.

Illiterature. *Hob.* 149. But there muſt be a declaratory Sentence.

Incontinency. In this (*c*) caſe likewiſe, there muſt be a declaratory Sentence.

Irreligion.

Layman. There muſt be a Sentence of deprivation, and notice to the (*d*) Patron by the Ordinary.

Mala in ſe. Guilty thereof, *Dyer* 293.

Married Prieſts. This was a cauſe of Deprivation before the Reformation, and therefore one was deprived in the Reign of Queen *Mary*, but reſtored 1 *Eliz.* by vertue whereof he was Incumbent without any new Preſentation; but in thoſe days a Prieſt might keep as many Concubines as he would.

Manſlaughter. Convicted thereof in the (*e*) Temporal Courts for the Eccleſiaſtical hath no Juriſdiction in Capital Caſes, and therefore the Sentence of deprivation is grounded upon the Conviction in the Courts at Law.

Murder.

Nonage. Under Twenty three the Patron muſt have notice, *March* 119.

Ordinary. Diſobedience to him, 2 *Cro.* 37.

Perjury. Convicted thereof.

Plurality. 'Tis void *ipſo facto*, by the Statute 21 *H.* 8. (*f*) and therefore no need of a declaratory Sentence, but the Patron is to take notice of ſuch avoidance.

Sacraments. Not adminiſtring in the form preſcribed.

Scandal.

Schiſm.

Surplice. Not wearing it.

Symony. This was a cauſe of Deprivation before the Statute 31 *Eliz. cap.* 6.

Tenths. Demanded at the Churches or Houſes of Clergymen by the (*g*) Collector, and not paid then or within 40 days after, and the Biſhop certifying this default in the Exchequer,

It hath been a queſtion whether the Biſhop's Certificate is peremptory in this (*h*) Caſe, and adjudged that 'tis not, but that it may be Traverſed, becauſe he certifies as an Officer, and not as a Judge.

Then there are ſome niceties in the Demand, and the Certificate, *viz.* That it muſt be made by a proper Officer, hav-

(*c*) Hob. 293. Cro. Eliz. 41. 789. (*d*) Dyer 293. 1 And. 16. 5 Rep. 102. (*e*) 2 Cro. 430. Hob. 121, 288. Keil. 181. (*f*) Cro. Car. 357. (*g*) 26 Hen. 8 cap. 3. (*h*) Cro. Eliz. 80.

ing

ing authority from the Biſhop, and not by an Apparator, neither can ſuch Officer appoint them to be paid to a Deputy or at any other place but the Houſe of the Clergyman, and they muſt be demanded in the name of the Biſhop, and he muſt not certifie the *non* payment only, but the place of demand, and all this muſt be after the 40 days are expired, for if he certifie before that time 'tis void, *Savile* 1. 26.

But in moſt of theſe Caſes, if the Party Appeal to a Superior Court, the Sentence by that means is ſuſpended, and if 'tis reverſed upon hearing the Appeal, the Clerk continues incumbent without any new inſtitution.

Yet if the Deprivation is for a thing meerly of Eccleſiaſtical cognizance, in ſuch caſe no Appeal lies, and the party hath no remedy but by a Commiſſion of Review, which is granted by the Queen of meer Grace, *Moor* 781.

In the next place there is a difference to be obſerved where a Benefice is only voidable, but not actually void before a declatory Sentence of Deprivation, and where 'tis made void *ipſo facto* by ſome Statute; for in the firſt caſe the Party muſt be cited to appear, there muſt be a Libel againſt him, and a time aſſigned both for the proof and anſwer to it, and liberty for Advocates to Plead and except againſt the Proof, and after all a ſolemn Sentence upon hearing the Allegations on each ſide, which by vertue of the (*i*) Canon muſt be pronounced by the Biſhop himſelf, with the aſſiſtance of his Chancellor or Dean, and ſome of the Prebendaries, or of the Archdeacon and two other grave Miniſters.

But none of theſe formalities are required where the living is made *ipſo facto* void; 'tis true, in that (*k*) Caſe the Ordinary muſt give the Patron perſonal notice of ſuch Deprivation before he can have a Title to preſent by Lapſe, becauſe 'tis *pœnal* both to the Incumbent and Patron, and 'tis not ſufficient to give notice in the Church, or to fix it on the Doors thereof, but it ought to be *veré proprié & perſonaliter & non fictè*, and if there ſhould be any difficulty in finding out the Perſon who hath the next Preſentation (as it may happen) or the Patron who hath the Inheritance of the Advowſon, the Biſhop in ſuch Caſe may award a *jus Patronatus*, and ſo give him notice who is found by Verdict to have the right, if he can be found in that County where the (*l*) Church is, if not, then publick notice is to be fixed on the Church Door; but this doth not bind the right of the (*m*) true Patron, if he that

(*i*) Canon 122. (*k*) Dyer 346. Cro. Eliz. 680. (*l*) Dyer 328. Cro. Eliz. 119. (*m*) Hob. 318.

is found by the Verdict on the *Jus Patronatus* ſhould not be the Parſon.

It hath been lately quſtioned whether the Archbiſhop hath a Power to deprive a Biſhop for any juſt Cauſe, or whether it ought to be done in Convocation.

Thoſe who deny the Archbiſhop's power in this Caſe, do affirm that he hath no ſuch Authority, either by the Canon or the Statute Law.

That the Canons are expreſly againſt it, for thoſe direct that a Biſhop ſhall be deprived in a Synod of the Provence, or if that cannot be aſſembled, then by the Archbiſhop and 12 Biſhops at leaſt, not as aſſiſtants, but as Judges.

I ſhall not enquire whether this Canon was ever received in *England*, but the Practiſe hath been againſt it; for Biſhop *Bonner* was deprived of his Biſhoprick by Commiſſioners appointed by the King:

I know 'tis ſaid that ſuch Commiſſions were Iſſued at that time from the Crown, by vertue of a Supremacy Lodged in our Kings, becauſe a Biſhop could not be deprived in a Synod ſo ſoon after the Reformation; for the Popiſh Biſhops and Clergy were then too numerous in thoſe Aſſemblies for the Proteſtants, and therefore they proceeded by ſuch Commiſſions.

But it was not an Objection againſt *Bonner*'s Deprivation, that it was Uncanonical, as being done by the King's Authority, but becauſe ſome of the Commiſſioners were Laymen, and what if they were? The Sentence ſhall not be therefore void, for 'tis not wholly an Eccleſiaſtical cenſure, ſo that none but Churchmen muſt be concerned in it, for 'tis of a mixt nature that a Layman may alſo joyn in ſuch a Cenſure:

Beſides, ſince a Biſhop is veſted with that Dignity by a Commiſſion from the King, 'tis reaſonable that he ſhould be deprived (where there is juſt Cauſe) by the ſame Authority, for tho' the Pope did formerly aſſume a Juriſdiction to deprive Biſhops, it was by Uſurpation, and what Power he had before the Reformation, the Kings of *England* have enjoyed ſince they have been Reſtored to their ancient Right.

Dilapidations.

'TIS not only the intereſt of the Church in general to preſerve what belongs to it, for the benefit of the Succeſſors; but 'tis a part of Common Juſtice and Honeſty that it ſhould be ſo; and therefore the Old Canons, and particularly that of Cardi-

Cardinal *Othobon, de Domibus Eccleſiarum reficiendis,* (*) and our own Provincial Conſtitutions require the Clergy ſufficiently to repair the Houſes belonging to their Benefices, which, if they neglect or refuſe to do, for the ſpace of Two Months after monition, then the Biſhop may cauſe it to be done out of the Profits of the Benefice; and by the Injunctions of *Edw. 6. Anno* 1547. and of Queen *Elizabeth* 12 Years afterwards the Clergy are required to ſet apart the Fifth of their Revenue to Repair their Houſes, and to keep them in Repair.

The Canon Law having ſo well provided for the Reparation of Houſes belonging to the Church, the next thing to be conſidered is, what ſhall be accounted Dilapidations;

And as to that, by the ſame Law, not only the decay of the (*n*) Buildings, but waſting the Woods, or any Eccleſiaſtical Revenues, or cutting down Timber, are held to be Dilapidations;

But 'tis not ſo at Common Law, for the Church is a Building; yet if 'tis in Decay, this is not any Dilapidation ſo as to Charge the Incumbent, becauſe by the General Cuſtom of *England* the Body of the Church is to be Repaired by the Owners of Houſes and Lands, in the Pariſh, unleſs where a contrary cuſtom prevails.

Now the Waſte for which a Parſon is to be Prohibited, ſhould be ſuch which goes to the Deſtruction of the Eſtate, or Revenues which belong to the Church; and therefore if a (*o*) Clergyman ſhould digg Mine in his Glebe, this hath been held to be no Waſte.

As to Trees, Woods, *&c.* belonging to the Church care is to be taken to preſerve them; for if they are felled for any other (*p*) uſe but for neceſſary Repairs, or for Fuel to be Spent in the Manſion Houſe, the Court will grant a Prohibition.

So if a Vicar cut down Trees in the Churchyard, a Prohibition lyes to ſtay Waſte, and the (*q*) Churchwardens may hinder him from carrying them away, this is accounted a Dilapidation, and by the opinion of my Lord *Coke* 'tis a ſufficient Cauſe of Deprivation.

By the Canon Law alſo, Dilapidations are made a Debt, which is to be ſatisfied out of the Profits of the Church; but if the Incumbent ſhould imploy thoſe Profits for his private Benefit, then 'tis to be ſatisfied out of his Perſonal Eſtate.

But the Common Law prefers payment of Debts due upon Contract, *&c.* before this Debt for Dilapidations; but not the payment of Legacies.

(*) Fol. 55. 2. (*n*) 2 Bulſt. 279. (*o*) Sid. 152. (*p*) 2 Bulſt. 279.
(*q*) 3 Bulſt. 158. 1 Roll. Rep. 335.

The Proſecution for this Offence may be brought either againſt the Incumbent himſelf, or againſt his Executor or Adminiſtrator:

If againſt the Incumbent, then 'tis proper in the Spiritual Court, and the Remedy is eaſie, for the Biſhops may Sequeſter the Profits of the Benefice to Repair the Buildings, *&c.*

If 'tis brought againſt the Executor it may be likewiſe in the Spiritual Court; but the Succeſſor may have a Special Action on the Caſe, upon the common Cuſtom of *England.*

Quod omnes (r) *Prebendarii Rectores & Vicarii Regni Angliæ, pro tempore Exiſtentes omnes & ſingulas domus & ædificia Prebendarum Rectoriarum & Vicariarum ſuarum reparare & ſuſtentare & ea reparata & ſuſtentata ſucceſſoribus ſuis dimittere teneantur, &c.*

Upon this Cuſtom ſeveral (s) Actions have been brought, and Damages recovered, which muſt be laid out within (*) Two Years afterwards upon the Reparations, or the Party forfeits double the Value to the Queen of ſo much as ſhall be received and not ſo emploied.

But leaſt ſuch a Recovery ſhould be made ineffectual by any Secret Conveyance of the Perſonal Eſtate of the (t) Incumbent, the Law hath provided that if any Clergyman makes ſuch a Gift of his Goods to Defraud his Succeſſor, he ſhall have the ſame Remedy in the Spiritual Court againſt the Perſon to whom ſuch Conveyance was made, as he might have againſt the Executors of the Deceaſed Parſon.

'Tis to be obſerved, that the Perſon to whom ſuch Gift or Alienation ſhall be made, ſhall make no farther Recompence than for the Dilapidations or Decaies which have happened *by the fault or default of the Incumbent*: Therefore, when a Parſon is Inducted, and finds the Buildings in Decay, and that his Predeceſſor did not leave a ſufficient Perſonal Eſtate to Repair them, he may have the Defects Surveyed by Workmen, and Atteſted under their Hands in the preſence of Two or more credible Witneſſes, which may be a means to ſecure him from that Charge which might enſue, for *the fault or neglect* of his Predeceſſour.

(r) Hern. 136. (s) Parl. Counc. 80. (*) 14 Eliz. cap. 11.
(t) 13 Eliz. cap. 10.

Diſpenſation

Diſpenſation. *See* Plurality Comendam.

THIS is a term uſed amongſt the Canoniſts, and it ſignifies a particular Privilege granted to a Perſon either to have or do that which by the Canon Law he was prohibited to do, *&c.*

The firſt Diſpenſations were only relaxations of that penance which Perſons were to undergo who had tranſgreſſed againſt the ancient Canons of the Church, but not a total releaſe of the force of thoſe Canons, ſo that they ſhould be no longer binding upon the Conſciences of Men.

But afterwards the Canoniſts made it to be a *Licenſe* for a Man to do that which he could not lawfully do without it, with a *non obſtante* to the Canon it ſelf; and the Biſhops did uſually diſpenſe with thoſe Canons which concerned Diſcipline upon pretence that the intereſt of the Church might be advanced by it, and by this means the ſeverity of the primitive Diſcipline was laid aſide.

This made the *Biſhops of Rome*, who were generally ambitious of Reputation to ſtand up for the ancient Canons, and they proſecuted the matter with ſo much Zeal, that they were eſteemed to be the Guardians of thoſe Canons, till at laſt they aſſumed a power over them, and then this Doctrine was ſtarted, that the authority of diſpenſing with them was a peculiar Prerogative veſted in the *Biſhop of Rome*, and that no inferiour Biſhop had any manner of power to diſpenſe.

Afterwards by the permiſſion of this very State, and by open and ſolemn deciſions in our Courts of Juſtice made in favour of the Pope's diſpenſing Power; the Eccleſiaſtical Laws were almoſt made uſeleſs, and this was the occaſion why the Parliament *Anno* 21 *H.* 8. *cap.* 13. thought fit to reſtrain and limit that power, and they began in caſes of Pluralities; for by the Canons of the Church no Man was to take more then one Benefice with cure of Souls, becauſe the ſame Perſon could not reſide in two places at the ſame time.

But the Pope to encreas his Revenue, did diſpenſe with Men to take pluralities without number or value, and therefore by that Statute the acceptance of a ſecond Benefice with cure of Souls, where the firſt was of the yearly value of 8 *l.* was made void, and that any Diſpenſation to the contrary ſhould not only be void, but the party procuring the ſame ſhould forfeit 20 *l.* to be divided between the Queen and Proſecutor.

About four Years afterwards the (*a*) Parliament taking notice that the Nation was made poor by Exactions of the *Biſhop of Rome*, and that he raiſed great ſums of Money by *Diſpenſations*; they prohibited all Perſons to Sue for them from *Rome* in any caſes whatſoever, and therefore they veſted the Archbiſhop of *Canterbury* with a Power to grant the ſame in things formerly uſed to be diſpenced withal, but not otherwiſe without the approbation of the King and his Council.

My Lord *Hobert* (*b*) tells us, that the meaning of thoſe words muſt be, that the Archbiſhop might Diſpenſe in all ſuch Spiritual Matters, which the Pope formerly did *quaſi de jure*, but not in every thing which he did generally, for he granted *Diſpenſations* againſt the Law of God, (*viz.*) to Marry within the prohibited Degrees, and likewiſe againſt the Laws of this Kingdom; as for an Alien who neither ſpoke or underſtood *Engliſh* to have a Benefice here with cure of Souls, tho' he never reſided upon it; and 'tis not ſufficient to ſay, that ſuch a place may be ſupplied by a Curate, becauſe the grant muſt be firſt legally fixed in the Grantee before it ſhall go in Deputation to another.

But tho' the Pope did aſſume this tranſendent Authority, yet I find a Power was lodged in the Kings of *England* long before *H.* 8. to grant Diſpenſations in Eccleſiaſtical Cauſes, as in caſes of Appropriations, Commendams, Exemptions, Pluralities, *&c.*

To inſtance in ſome more particularly, (*viz.*) by the Canon Law every Spiritual Perſon is viſitable by his Dioceſan, but *William*, called the *Conqueror*, exempted the *Dean of Battel in Suſſex* from Epiſcopal Viſitation, and ſo it continues at this very day.

And even at that time when the Pope was (as my Lord *Hobert* calls him) *Dæmon meridianus*, and his Authority very great in this Kingdom; the Crown kept poſſeſſion of that juſt Power of diſpenſing *in Spiritualibus*, as to retain a Benefice with a Biſhoprick to hold two Livings, *&c.*

'Tis true, it was the Opinion of ſome (*c*) Parliaments in that King's Reign, that the *Biſhop of Rome* had deceived the People of *England*, by perſwading them, that he had an abſolute Power to diſpenſe with Human Laws in all Spiritual Caſes; that it was an Uſurpation which derogated from the Imperial Crown, becauſe the King had no Superior here, and that the People were not bound to obſerve the Laws of any Foreign Prince or Prelate, but only the ancient and accu-

(*a*) 25 H. 8. cap. 21. (*b*) Hob 147. (*c*) 28 H. 8. cap. 16.

ſtomed

ſtomed Laws of this Realm, and that therefore it was both juſt and reaſonable that the King and Parliament might diſpenſe with ſuch Laws, and accordingly they did diſpenſe with the ſame.

For tho' ſome of thoſe which we call Eccleſiaſtical Laws were at firſt made by a Foreign Prelate, yet being eſtabliſhed here by a long and continual uſage they are now become the Laws of the Land, and not to be diſpenſed withal by that Power by which they were originally made but by the Queen her ſelf. (*d*)

And as ſhe may diſpenſe with thoſe Laws, ſo ſhe may pardon all Suits in the Eccleſiaſtical Courts, which are *pro reformatione morum*, or *pro ſalute animæ*.

Divorce.

THIS is a Separation of a married Man and Woman by the Sentance of an *Eccleſiaſtical* Judge qualified to pronounce the ſame.

Tho' the Sentence is now given by ſuch a Judge, yet originally the Church had no Power to Divorce for inceſtuous Marriages, and ſo to Baſtardize the iſſue, for theſe were Acts to be done by the Civil Powers, and by the Coertion of ſuch Laws to which the parties were locally ſubject; the Church had only Power to prohibit ſuch Perſons from receiving the Communion with the reſt of the Chriſtians.

But notwithſtanding the Spiritual Court hath now a Juriſdiction in this caſe, yet the Judge is reſtrained in this part of his Judicature by ſeveral Canons; as for inſtance,

(1.) (*e*) He ſhall not give Judgment upon the confeſſion of the Parties alone without any other Proof.

(2.) (*f*) The Sentence muſt be pronounced in open Court in the Seat of Juſtice, but not without the knowledge of the Archbiſhop, Biſhop of the Dioceſs, or Dean of the Arches.

(3.) (*g*) And that in all Sentences of Divorce *a menſa & thoro* the parties give Bond not to Marry during each others Life.

(*h*) The Judge offending in the Premiſes, ſhall be ſuſpended from his Office for a Year, and the Sentence of Divorce ſhall be void.

(*d*) 5 Rep. 21. (*e*) Canon 105. (*f*) Canon 106. (*g*) Canon 107. (*h*) Canon 108.

There are ſeveral cauſes of Divorce, of which our Law takes notice.

(1.) *Præcontract.*

(2). *Conſanguinity, Affinity, Impuberty.*

(3.) *Frigidity.*

And theſe are *a vinculo Matrimonij.*

(4.) *Adultery, Fornication, Propter ſævitiam.*

And theſe are only *a Menſa & thoro.*

In all thoſe Caſes where the Divorce is *a vinculo matrimonij* the Marriage was not *de jure*, becauſe it was void *ab initio*, for where the incapacity ariſes by reaſon of any matter precedent to the Marriage, there 'tis only *de facto*, and the Sentence of Divorce in ſuch caſe is only declaratory, that the Marriage is diſſolved, for it was abſolutely void before; (*i*) and either of the Parties might Marry again tho' the other was living.

But 'tis otherwiſe where the Divorce is occaſioned *ex cauſa ſubſequenti* as in caſes of Adultery, Fornication, *&c.* for there the Marriage being once good, or as my Lord *Coke* (*k*) calls it *juſtæ nuptiæ* can never be diſſolved, becauſe ſuch ſubſequent Cauſe cannot effect the bond of Marriage, tho' 'tis ſufficient to ſeparate the parties *a menſa & thoro*, which is in the nature of a temporal but not a perpetual Divorce, and if either of the Parties Marry again, the other being living, ſuch Marriage is void, and ſo it was adjudged in the caſe of *Rye and Fulcomb* (*l*).

And as a farther confirmation of the Law in this matter, it was adjudged about two years afterwards that a Divorce (*m*) *cauſa adulterij* is no Bar of Dower which ſhews that the Marriage is not diſſolved.

But tho' it ſtill continues, yet ſuch a Divorce *a menſa & thoro* doth protect each party from being a Felon, tho' they marry again the other being living, for Poligamy was not Felony till made ſo by the Statute *Anno* 1 *Jac. cap.* 11. in which there is a Proviſo, that it ſhall not extend to Perſons legally divorced.

'Tis true the Court *Anno* 12 *Car. Gro.* 461. doubted of this matter in *Poreſt's Caſe* where the Divorce was *propter ſævitiam* of the Husband, and the Woman married again, her firſt Husband being then alive, but no reaſon was given for this doubt, only that many inconveniences might enſue Divorces upon ſuch a pretence, and therefore they adviſed the Woman to get a Pardon, tho' the Divorce in this caſe is grounded upon

(*i*) Co. Eliz. 857, 858. (*k*) 3 Inſt. 89. (*l*) Noy 100. Moor. (*m*) Noy 108 Go. b. 145.

natural

natural Right, and like a Divorce, for Adultery is never to be allowed upon the confeſſion of the Parties, but upon plain Proof.

Precontract.] I ſhall now treat of the ſeveral cauſes of Divorce before-mentioned, and firſt of Præcontract.

This makes a nullety of the Marriage *ab initio*; but if a Man marrieth a Woman who is (*n*) præcontracted to another, and hath Children by her they are his Children till the Divorce, and then they are Baſtards.

A Præcontract is called a Marriage *per verba de præſenti tempore*, now if after ſuch a contract the (*o*) Woman marrieth another, the Man with whom ſhe contracted, may compel her by a Sentence in the Spiritual Court to marry him without making the other Man whom ſhe actually married a party to the Suit, and without any Sentence of Divorce as to that Marriage, and if they Marry after ſuch Sentence, their Children ſhall be Legitimate, and this was *Bunting*'s Caſe.

Conſanguinity and Affinity.] I ſhall in the next place treat of *Conſanguinity* and *Affinity* in the prohibited degrees, one of which is a relation ariſing out of nearneſs of Blood, the other out of Marriage.

Cajetan was of Opinion, that the Laws concerning Marriage in *Leviticus* did not bind the Chriſtian Church, becauſe they were only poſitive Precepts given to the *Jews*, and therefore were binding to them only, and not to Chriſtians.

But this ſeems to be a miſtaken Opinion, for Marriage was inſtituted in a pure State of Innocence, tho' it was afterwards corrupted by the inceſtuous Conſociations of Kindred in the very neareſt Degrees, which was diſpenſed withal in thoſe early Days, till the World was competently Peopled, for at firſt the Marriage of a *Brother with a Siſter of the whole Blood* was not thought unnatural but neceſſary, it was enjoyned by the poſitive Command of God, which was to encreaſe and multiply; and if *Adam*'s Sons had not gone into their Siſters, I cannot ſee how the World had been encreaſed; ſo that Brothers marrying their own Siſters ſeems to be *coæval* with Mankind.

After the Flood many Marriages which were afterward prohibited by *Moſes*, were not only Lawful, but rewarded with particular Bleſſings, as that of *Abraham* with *Sarah*, who was his *half Siſter by the Mothers ſide*, which was expreſly prohibited in *Leviticus* (*p*), (*viz.*) *Thou ſhalt not diſcover the ſhame of thy Siſter the daughter of thy Father.*

(*n*) 2 Inſt. 93. (*o*) Moor 109. 4 Rep. 29. (*p*) Lev. 18. ver. 9.

And

And even *Moſes* himſelf was born of an inceſtuous Marriage between *Amram* and *Jochobed* (*q*), who was his *Father's Siſter*, which is within the *Levitical* Degrees (*r*).

But that primitive Bleſſing which was originally given by God himſelf to *Adam* in Paradiſe, that he ſhould be Fruitful and Multiply, and repleniſh the Earth, was reſtrained by *Moſes* after the World was peopled, by laying down Rules and prohibitions concerning the degrees of Kindred and Affinity, which he formerly and particularly gave to the Man, but none to the Woman, yet the reaſon of one extends to the other.

Now 'tis to be obſerved, that the Prohibition was given to the Man, becauſe in the Act of uncovering the nakedneſs, *&c.* he is properly the firſt Agent, and the Woman is only conſenting to it, for 'tis as impoſſible that ſhe ſhould uncover his nakedneſs as 'tis for her to raviſh him.

Some of thoſe Rules are moral Precepts and declarative of the Law of Nature it ſelf, and by conſequence were not only obliging to the *Jews*, but to all Chriſtian People; as for inſtance, in the deſcending Line a Man is prohibited to Marry his *Daughter or Grandaughter*, and as to nearneſs of Blood in that Line, the Prohibition goes no farther, but morally it extends to all others deſcended from him, tho' never ſo remote, and the reaſon is given by the learned *Grotius* (*ſ*) becauſe, tho' the Wife is ſubordinate to the Husband by the Laws of Marriage, yet that allows ſo great a familiarity between them as is not conſiſtent with a duty of a Child to a Parent, for in the aſcending Line the prohibition goes no farthan the Marriage with ones Mother in expreſs terms, but all degrees upwards in that Line are equally prohibited, tho' not expreſſed, ſo that there can be no lawful Marriage either in the deſcending or aſcending Line of Generation.

Now the reſt of the *Levitical* prohibitions in caſes of Marriage ſeem to be warranted by God himſelf (*t*) for when a certain Sect of the unbelieving *Phariſees* were of Opinion, that they ought to keep the Law of *Moſes*, and ſome of them who came from *Judea* had taught the Gentiles that they could not otherwiſe be ſaved, when theſe Men could not be convinced to the contrary by the Arguments of St. *Paul* and *Barnabas*, they went together to *Jeruſalem* where a great Council of the Apoſtles and Elders were aſſembled to determine this matter, and *Peter* who was their Speaker, told the Peo-

(*q*) 6 Exod. 20. (*r*) 18 Lev. 12. (*ſ*) Ce jure belli, Lib. 2. cap. 5.

(*t*) Acts 15.

ple

ple that theſe Men tempted God by their Opinions to put a Yoak upon the necks of the Diſciples, which neither they or their Fathers were able to bear; the reſult of this Council was (as it appears by the Letter which they ſent to *Antioch*) that it ſeemed good to the Holy Ghoſt, and to them to lay upon the Gentiles no greater burthen then thoſe four neceſſary things;

(1.) To abſtain from Meats offered to Idols:
(2.) From Blood.
(3.) From things ſtrangled,
(4.) And from *porneia*, which our Tranſlation hath rendered *Fornication*, but in the *Septuagint* it ſignifies any unlawful or inceſtuous Copulation.

It could not be ſimple Fornication, becauſe by the very Law of *Moſes*, that was ſatisfied by the marriage of the Man with the Woman, and frequently by a pecuniary compenſation.

So where St. *Paul* in his Epiſtle to his *Corinthians* (*u*) condemns the marriage with his *Father's Wife*, becauſe it was a *Fornication* not ſo much as named amongſt the *Gentiles*, this could not be intended of a ſimple *Fornication*, but of any inceſtuous Marriage.

Another of thoſe Prohibitions is, that a Man ſhall not diſcover the nakedneſs of his *Brother's Wife*.

'Tis to be obſerved, that before this Prohibition, it was not only lawful, but a Man ought to marry his Brother's Wife if he died without Iſſue, and the raiſing up Seed to him was called the doing the Office of a Kinſman, as in the caſe of *Onan* (*x*) before the Law.

After the Law this was ſo well known amongſt the Evangeliſts, that when the Sadducees (*y*) who denied the Reſurrection, told our Saviour that *Moſes* ſaid, if a Man died without Children, his Brother ſhould marry his Widow, and raiſe up Seed to his dead Brother; and having likewiſe told him, that one amongſt them had married ſeven Brothers ſucceſſively, and asked him whoſe Wife ſhe ſhould be at the Reſurrection? Our Saviour did not condemn the Cuſtom, or take notice that the Marriage was unlawful, but anſwered the Queſtion plainly, (*viz.*) *That at the reſurrection there was no marrying*, &c..

But tho' this Law was not binding to the *Jews*, unleſs the dead Brother had no Iſſue; yet 'tis obligatory to us Chriſtians in the ſtrict ſenſe and acceptation of the words; for St.

(*u*) 1 Cor. 5. 1. (*x*) 38 Gen. 8. 25 Deut. 5. (*y*) 22 Matt. 23.

John

John Baptiſt told *Herod Matt.* 14. 4. it was unlawful for him to marry his *Brother's Wife.*

There is another degree of Affinity which reſembles this, and 'tis where a Man marries *his Wive's Siſter*, this is likewiſe within the *Levitical* degrees.

But ſome Arguments have been invented to prove that the reaſon is not the ſame in theſe caſes, for the Text ſhews upon what account one Brother ſhall not marry the Widow of his deceaſed Brother, *viz.* becauſe he ſhould not diſcover the nakedneſs of his Brother's Wife.

Now that can be no reaſon againſt a Man's marrying his Wife's Siſter, becauſe it muſt be preſumed, that he hath uncovered his firſt Wife's nakedneſs before he married her Siſter.

The Scripture which concerns this caſe is in theſe words, *viz.* (*a*) *Thou ſhalt not take a Wife to her ſiſter to vex her to uncover her nakedneſs, beſides the other*, **in her life time.** which implies that it may be done after one Siſter is dead, for then ſhe cannot be vexed.

It was the Opinion of *Grotius* (*b*) that thoſe words ought not to be underſtood as an indefinite Prohibition that one Man ſhould not marry two Siſters, but that he ſhould not have them at the ſame time, and he tells us, that by an Apoſtolical Canon (*c*) ſuch Marriages were not condemned as ſinful but inconvenient, and the puniſhment was that the perſon ſo marrying could not be admitted into the order of a Prieſt: But ſome are of Opinion that the ſaid Canon cannot be underſtood of having two Siſters at the ſame time, for that was never permitted amongſt Chriſtians, therefore it muſt be intended of marrying one Siſter after the death of another, and if that was lawful when that Canon was made, why was there any puniſhment inflicted for doing a lawful Act? if it was unlawful at that time, how come it to be lawful ſince?

A degree a little more remote, is the (*d*) *marrying the Wives Siſters Daughter*; there was a Libel in the Spiritual Court againſt the Parties thus married, and they proceed there to Excommunication, but a prohibition was granted, and the Defendant demurred upon it, but it doth not appear what became of the caſe, yet my Lord *Vaughan* (*e*) tells us, that in the very like caſe a prohibition was denied, tho' this marriage is not expreſly within the *Levitical* degrees, but becauſe Marriages more remote are forbidden, the high Commiſſioners

(*a*) Lev. 18. 18. (*b*) De jure belli, lib. 2. cap. 5. part 14 (*c*) Canon 18.
(*d*) Sid. 434. (*e*) Vaugh. 206. 2 Vent. 9.

gave

gave Sentence of Divorce (*f*) in ſuch Caſe, and upon a motion for a Prohibition upon the Statute 32 *Hen.* 8. it was denied, becauſe the Court never Prohibits in Caſes of Marriage, but where they are out of the Levitical degrees, and this was *Man*'s Caſe. Tis true, Serj. *Moor* hath reported the ſame Caſe to the contrary, *viz.* That a Prohibition was granted becauſe it was a Marriage not Prohibited, but this might be upon the firſt debate of the Caſe; for my Lord *Vaughan* tells us, that at firſt Prohibitions were granted upon the (*g*) Statute, in Caſes which were not ſpecifically mentioned in the 18th of *Leviticus*, but that upon conſideration of the degrees therein Prohibited, conſultations were afterwards granted, becauſe ſome Marriages muſt be Prohibited which are not nominally expreſſed in that Chapter, as the Marriage of the Father with his own Daughter.

So where a Man Married his Siſters Daughter, this is not within the *Levitical* degrees; and this was (*h*) Sir *Giles Allington*'s Caſe, but *Huntley* tells us, it was the Daughter of his half Siſter, by the Father's ſide, and that he was fined 10000 *l.* committed, excommunicated and Divorced.

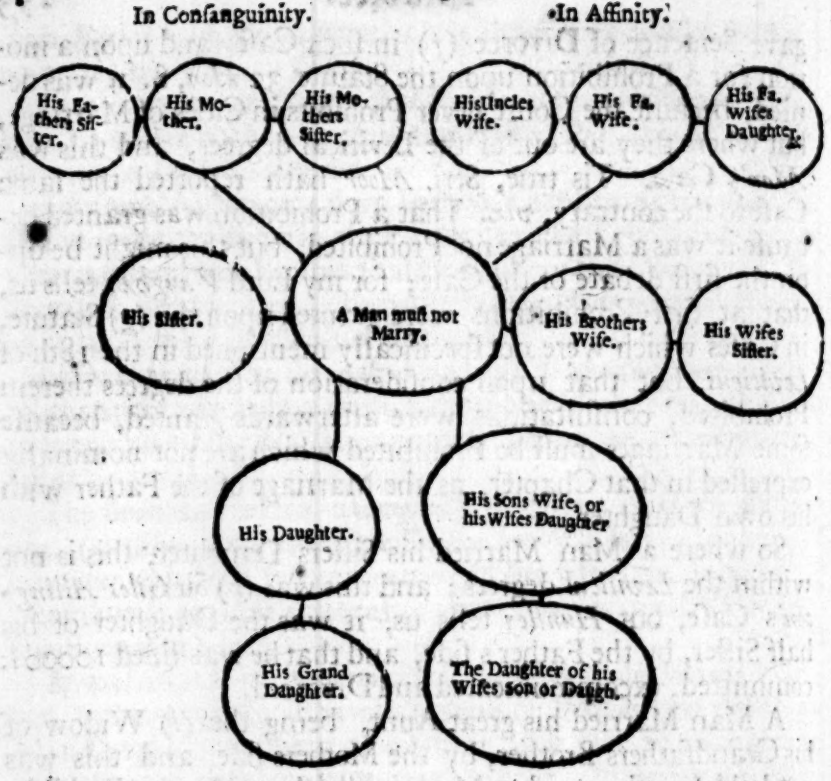
A Man Married his great Aunt, being the (*i*) Widow of his Grandfathers Brother, by the Mothers ſide, and this was not held Inceſtuous; but Marrying with an Aunt is Prohibited, becauſe 'tis a Contradiction that ſhe ſhould be inferior to her Husband in point of Marriage, and ſuperior to him in point of Parentage.

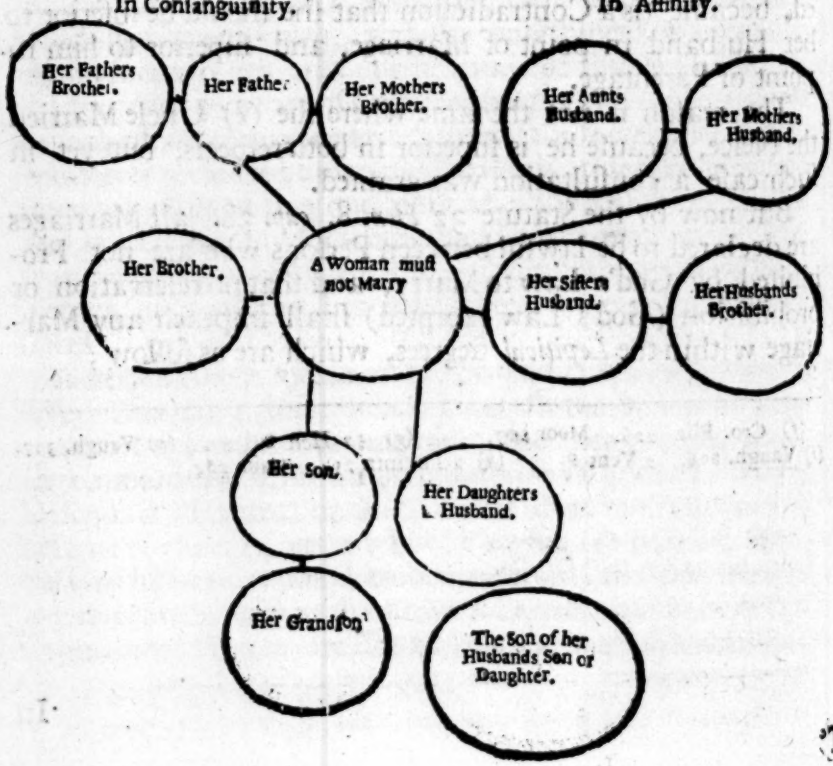
The reaſon is not the ſame where the (*k*) Uncle Married the Neice, becauſe he is ſuperior in both reſpects, but yet in ſuch caſe a conſultation was granted.

But now by the Statute 32 *Hen.* 8. *cap.* 38. all Marriages are declared to be lawful between Perſons who are not Prohibited by God's Law to Marry, and that no reſervation or prohibition (God's Law excepted) ſhall impeach any Marriage within the *Levitical* degrees, which are as follow;

(*f*) Cro. Eliz. 228. Moor 907. (*g*) 32 Hen. 8. (*h*) Vaugh. 323. (*i*) Vaugh. 206. 2 Vent. 9. (*k*) 2 Levintz 254. Haim 464.

In


In Consanguinity.
In Affinity.
His Fathers Sister.
His Mother.
His Mothers Sister.
His Uncles Wife.
His Fa. Wife.
His Fa. Wifes Daughter.
His Sister.
A Man must not Marry.
His Brothers Wife.
His Wifes Sister.
His Daughter.
His Sons Wife, or his Wifes Daughter
His Grand Daughter.
The Daughter of his Wifes Son or Daugh.


In Consanguinity.
In Affinity.
Her Fathers Brother.
Her Father.
Her Mothers Brother.
Her Aunts Husband.
Her Mothers Husband.
Her Brother.
A Woman must not Marry
Her Sisters Husband.
Her Husbands Brother.
Her Son.
Her Daughters Husband.
Her Grandson.
The Son of her Husbands Son or Daughter.

'Tis

'Tis to be obſerved upon theſe degrees, that in Affinity the Man is prohibited to Marry his Uncles Wife; the Text in *Leviticus* is his Father's Brothers Wife; but to Marry the Mothers Brothers Wife is within the ſame degree, and that is not Prohibited.

He is likewiſe forbidden to Marry his Brothers Wife, which was not Prohibited by the Jewiſh Law generally, but only in caſes where the Brother died leaving Iſſue, for if he had none, the ſurviving Brother was commanded to Marry the Widow.

He is alſo Prohibited to Marry his Wife's Siſter; but this was not forbidden to the Jews, but only during the life of both Siſters, that the firſt Wife might not be vexed by her Husbands Marrying her Siſter, for Poligamy was allowed amongſt the Jews.

About 23 Years after the making the aforeſaid Statute, *viz. Anno* 5 *Eliz.* there was a Table ſet forth by the Queen, in which the degrees of Marriage was contained; and about 40 Years afterwards, (*viz.*) *Anno* 1 *Jac.* all Perſons were Prohibited by the (*) Canon to Marry within the degrees Prohibited by the Law of God, and expreſſed in that Table, and that Marriages otherwiſe contracted ſhall be Inceſtuous.

'Tis probable, the Statute was not made upon any Religious conſideration, but in a compliment to *Hen.* 8. who had Married his Elder Brother's Widow; and (as the Hiſtories of thoſe times mention) being very weary of her, deſired a Divorce upon a ſcruple of Conſcience, that the Marriage was unlawful, and having procured the Opinions of ſeveral Divines in his behalf, the Parliament made that Law to prohibite Marriages within the *Levitical* degrees, which was a confirmation of his Divorce; for this is the firſt inſtance which can be given of the Parliaments medling with Marriages, in the degrees of Kindred:

However, a Law it is, and my (z) Lord *Coke* in his Expoſition upon it, tells us, That all the Law of God which Prohibits Marriages, is conteined in the *Levitical* degrees, which muſt be a miſtake; for Perſons precontracted, and thoſe which are naturally Impotent are prohibited by God's Law to Marry, becauſe the end of Marriage is fruſtrated where there is a natural Impotency in either Sex, and yet ſuch Marriages are not prohibited by the Laws of *Moſes.*

Impuberty.] Marriages *infra nubiles. annos* are unlawful; now the Age of conſent for a Man is 14 Years, and for a Woman 12 Years, and therefore if Two are Married before

(*) Can. 99. (z) 1 Inſt. 235.

the

the Age of conſent and are Divorced for that Reaſon after they come to full Age, the Woman may have an Aſſize for (*a*) Lands given to them in Frank Marriage, which ſhews that the Bond of Marriage is diſſolved, for otherwiſe ſhe could not have an Aſſize againſt her Husband.

It was for this Cauſe that (*b*) *Kenn* was Divorced, and thereupon a Queſtion did ariſe, (*viz.*) he had Iſſue by his Wife from whom he was Divorced, and afterwards he Married again, his firſt Wife being Living, and he had likewiſe Iſſue by his ſecond Wife, which Marriage was by ſentence in the Eccleſiaſtical Court declared to be lawful after his Death, the Queſtion in the Court of Wards was, who ſhould be his lawful Heir? and it was adjudged that the Daughter of his ſecond Wife ſhould inherit; for tho' it was proved that he lived with his firſt Wife 10 Years before the Divorce, and were both of Age of conſent, yet ſuch conſent ſhould not be averred againſt a Sentence of Divorce, ſo long as it ſtood unrepealed, becauſe the Eccleſiaſtical Judge had declared the Marriage void, and he is Judge as well of the Age of conſent as the Original Contract.

'Tis true, ſuch Sentence of Divorce might be Repealed after the Death of one of the Parties, in an Action at Common Law, where the conſent may be proved, when the Parties were of Age, for the Divorce for *Impuberty* is but Evidence, and not concluſive, becauſe the matter is properly triable in the Temporal Courts.

But tho' a Divorce may be repealed after the death of the Parties. yet a Sentence of Divorce ſhall never be given after their death, for that would be to Baſtardize their Iſſue.

Now, he who would Baſtardize an (*c*) Heir muſt make the Marriage void, by ſome Judgment legally executed, but that cannot be done after the death of one of the Parties, becauſe the Marriage is then determined.

Frigidity.] This is a Term which relates only to the Man, who hath a perpetual inability to Generation, and 'tis called *arotitudo* or impotency, when it relates to a Woman.

As to this matter there happened a very remarkable Caſe, *Anno* 40, & 41 *Eliz.* which was thus;

The Wife of one (*d*) *Bury* was Divorced from him *cauſa frigiditatis*, it appearing that for Three Years after the Marriage ſhe *remanſit virgo intacta propter perpetuam impotentiam* of her Husband, he afterwards Married again, and his Wife had

(*a*) Br. Abr. fo. 224. Plito 6. (*b*) 7 Rep. 42. (*c*) Bro. Abr. fo. 224. Plito 5. (*d*) Moor 225. 5 Rep. 98. Dyer 179.

Chil-

Children, and the queſtion was, whether they were legitimate or not, and adjudged that they were, becauſe Born during the Coverture, and before any Divorce had as to the ſecond Marriage, which they agreed to be voidable, but that it continued a Marriage till it was diſſolved.

My Lord *Coke* tells us, a Writ of Error was brought upon this Judgment, and that it was affirmed in the *Queen's-Bench* upon great deliberation, but yet it ſeems to be a very hard Judgment, and the diſtinction which is there made, *(viz.)* that a Man may be *habilis & inhabilis diverſis temporibus*, is not applicable to the circumſtances of that Caſe; 'tis true, a Man may be ſo, where the inability is *ex malefitio*, but if a Man hath a perpetual and natural impotency, 'tis impoſſible he ſhould be *habilis* at any time, and the Marriage in ſuch Caſe is not voidable, but void *abinitio*.

'Tis to be obſerved that the reaſon of the Sentence beforementioned is agreeable to the Civil Law, which requires that there ſhould be a Cohabitation for three Years, for the trial of the diſability, before any proof is allowed to the contrary, unleſs it plainly appears upon the Oath of able Phyſicians, and upon inſpection of the Perſons, that the impotency is not accidental but natural, and incurable.

To the like purpoſe was the Lady *Eſſex* Caſe, who, upon her Petition to King *James* the firſt, obtained a Commiſſion under the Great Seal, directed to the Archbiſhop of *Canterbury*, and to 5 other Biſhops, *&c.* to proceed in a Cauſe of nullity of Marriage, between the Earl of *Eſſex* and her ſelf, by reaſon of his Frigidity.

The Libel againſt him was, that for Three Years after the Marriage they did cohabit as Man and Wife; but that before, and ſince the Marriage, he had a perpetual Impotency, at leaſt in reſpect to her.

The Earl replied, that he was *frigidus quoad illam*, but not as to any other Woman, for he found that ſhe was not *apta* to have Children.

Thereupon the Commiſſioners appointed Three Ladies and Two Midwives to inſpect her, who returned that ſhe was *apta*, and becauſe the Law preſumes that where there is Three Years cohabitation after Marriage, *& nil ad copulam*, there muſt be, *impotentia coeundi in viro*, which diſability, whether it proceeds from any natural defect, or by any other accident whatſoever, yet if it preceede the Marriage, it ſhall convict the Man of Impotency, and by conſequence make it void.

Adultery.] For Adultery there may be a Divorce, *a Menſa & thoro*, but the Marriage ſtill continues; therefore, if the

(e) Husband after ſuch a Divorce releaſes a Bond made to his Wife before the Coverture, 'tis good.

But yet after ſuch a Divorce the (f) Wife may Sue alone in the Spiritual Court, for a Deſamation, and the Husband's releaſe in ſuch Caſe is not good, becauſe the Suit was meerly for a Spiritual matter, 'tis to reſtore her to her Credit and Reputation, and the Coſts are not given to recompence any Damage, but only *pro Expenſis litis*, ſo nothing is veſted in the Husband upon which this Releaſe might operate.

'Tis true, if after ſuch a Divorce the Woman will Sue alone for a Legacy, the Releaſe of the Husband ſhall be good, becauſe the (g) Legacy was once veſted in him by the Intermarriage; and the Suit brought by the Woman was for a real Intereſt in the thing it ſelf, which ſhe had loſt by the Intermarriage.

St. *Mathew* tells us, *That whoſoever ſhall put away his Wife (except 'tis for Fornication) and ſhall Marry another, committeth Adultery*; (h) from whence it hath been concluded, that where the Divorce is for Fornication, the Innocent Perſon might marry again without being Adulterous.

But the words of the other Evangeliſts being general, and without any exception, are indifinitely againſt Marriages, after any manner of Divorce, as thus, (i) *Whoſoever ſhall put away his Wife, and Marrieth another, committeth Adultery; and whoſoever Marrieth her who is put away committeth Adultery*; and (k) St. *Paul* tells us, *That the Wife ſhould not depart from her Husband, but if ſhe departs let her remain unmarried.*

Now the Anſwer to this may be, That where an inſpired Writer aſſerts a thing fully in one place, and not ſo full in another, that muſt be expounded by the place which is moſt full.

'Tis probable, that upon the Authority of theſe Scriptures the (*) Canon Law is againſt Second Marriage, after any Divorce, whilſt both Parties are Living, by which Law there is a reſtraint in the very Sentence it ſelf, (*viz.*) that the Parties ſeparated *a Menſa & thoro*, ſhall live chaſtly, and not Marry during each others Life, and that no Sentence of Divorce ſhall be pronounced until the Party requiring the ſame ſhall give good Security and Caution to the Court not to break the ſaid Prohibition; and if the Judge ſhall give Sentence in any other manner, (l) he ſhall be ſuſpended from the exerciſe of his Office for a Year, and that the Sentence ſhall be void.

(e) Croſ Eliz 908. Moor 605. 683. (f) 1 Rol. Rep. 426. 2 Rol. Abr. 298. (g) 2 Rol. Abr. 301. (h) 19 Mat. 9. (i) 10 Mark 11. 16 Luke 29. (k) 1 Cor. 7. 11. (*) Canon 107. (l) Canon 108.

Now,

Now, in all these Sentences of Divorce, or rather Separation, *a Mensa & thoro*, the Civil Law requires that there should be this Clause, (*viz. Dictas* J. *& S. scilicet, partes illas quæ cupiunt, divortium ratione Adulterii allegati & probat. a thoro & Mensa ac mutua cohabitatione ac obsequiorum conjugalium impensione donec, & quousq; duxerint invicem reconciliandos & non aliter nec alio modo seperamus*, and not only the Security beforementioned is to be given, but the Judge himself is required expresly to inhibite the Parties from Marrying again, and to admonish them to live singly till reconciled, and if they Marry afterwards 'tis acconnted by the Canon Law to be Adulterous, and the Parties may be punished in the Spiritual Court.

But this separation, whilst the Bond of Marriage still continued, was an invention of the Canonists, for the ancient Fathers of the Church had no notion of it, they were of opinion that the Bond of Marriage was actually dissolved in cases of Adultery, especially where the Woman was an Adulteres, because the end of Marriage being to ascertain the Issue, and the Contract it self being no more than a mutual transferring the right to each others Person, in order to that end; therefore, the breaking that Contract doth naturally infer that the Marriage is dissolved, and the rather, because the end of Marriage it self is destroyed.

I shall conclude this Head with the famous Case of the Marchioness of *Northampton*, who was convicted of Adultery in the Reign of *Hen.* 8. and the Marquess was Divorced from her in the beginning of the Reign of *Edw.* 6. and thereupon a Commission was granted directed to Archbishop *Cranmer*, and to 9 other Divines, to certifie whether she continued his Wife, notwithstanding the Divorce *a Mensa & thoro*, and whether by the word of God he might Marry another.

But before this matter was determined, the Marquess Married again, at which the Privy Council were offended, because, according to the Canon Law the first Marriage was good, and continued after such a Divorce.

The Marquis insisted, that by the Law of God the very bond of Marriage was dissolved for Adultery, and that Marriage it self was never thought to be indissoluble till the Church of *Rome* had made it a Sacrament, but yet that Church by the help of the Canonists had invented such distinctions which made it easie to be avoided.

That it would be very inconvenient if a Marriage should not be dissolved for Adultery, because then the innocent Per-

ſon muſt live with the guilty, or be tempted to commit the like Sin, if the Bond of Marriage ſtill continued.

In ſome ſhort time afterwards the Delegates gave Judgment in favour of the Second Marriage, and amongſt other things they founded it upon the definition our Saviour made of Marriage,

That two ſhould be one fleſh; ſo that when that was divided, as it muſt be by Adultery, the Marriage it ſelf was diſſolved.

That St. *Paul* ſpeaking of an Unbeliever departing from his Wife, tells us, that in ſuch caſe the believing Party is not under Bondage, which is an intimation that the Bond is diſſolved meerly for forſaking his Wife, and if ſo, it muſt certainly be diſſolved for Adulteiy.

'Tis true, the (*a*) Sentence given by theſe Delegates, was about 4 Years afterwards confirmed by a private Act of Parliament, to which Two Peers and Two Biſhops diſſented, and the Second Marriage was declared to be good by the Law of God, any Canon or Eccleſiaſtical Law to the contrary notwithſtanding.

But in the very next year (*viz.*) *Anno* 1553. that Act was repealed, and the reaſon is mentioned in the Preamble (*viz.*) becauſe it was obtained upon private reſpects, and that it was an incouragement for licentious Perſons to procure Divorces upon falſe Allegations.

Propter Sævitiam.] A Divorce *cauſa Sævitiæ* is grounded *ex inre naturæ*, for ſince Marriage was inſtituted in a State of Innocence, it muſt of conſequence be for the mutual Comfort and help of each other, and therefore a cruel and ſevere uſage fruſtrates one of the ends of that State.

The Spiritual Court hath a proper Juriſdiction in caſes of this nature, and we have inſtances of Suits brought there by the Wife for a Separation, *propter Sævitiam*, and in one (*) Caſe Sentence was given for the Husband againſt the Wife, yet he was forced to pay all the Coſts for her; afterwards the Wife brought an Appeal, and becauſe the Husband would not appear and anſwer, and pay for the tranſmitting the Record, he was Excommunicated; and the Court of Common Pleas doubted whether they ſhould grant a Prohibition, becauſe the proceedings were according to the courſe and practiſe of the Eccleſiaſtical Courts.

The Wife of one *Porter* was (†) Divorced from him for the ſame cauſe, but it was a *Menſa & thoro* only, for this ſort of

(*a*) B. H. R. 2 Ps. 192. (*) Cro. Car. 16. (†) Cro. Car. 461.

Divorce

Divorce gives the Woman liberty to live ſeparately from her Husband, and 'tis no more then a proviſion for her ſafety, and to avoid his cruel Miſuſage, for ſhe cannot marry again during his Life, without being in danger of commiting * Felony.

Laſtly, There is ſome difference as to Lands and Goods of perſons Divorced.

For if Lands are given to † Husband and Wife, and to the Heirs of their Bodies begotten, and afterwards they are Divorced, they ſhall have only a Free-hold for their reſpective Lives; but their Children ſhall never inherit, for that is loſt by the Divorce.

If they are joint Purchaſers, and afterwards Divorced they ſhall hold by Moities.

As to Goods if a * Woman who hath a perſonal Eſtate, marrieth and is Divorced, ſhe ſhall have her Goods again; but if the Husband had diſpoſed or ſold them during the Coverture, ſhe is without remedy.

Donative.

THIS is a Benefice collated by the Patron to an Eccleſiaſtical Perſon without preſentation to the Biſhop, or any inſtitution by him, or induction by his Order.

The Original of theſe Donatives was either,

(1.) By a Royal Licenſe, Or,

(2.) By ſome particular Privilege,

As to the firſt, the Queen, by her Letters-patents, may Licenſe any Perſon to found a Chappel, and may appoint that it ſhall be a *Donative*, and not preſentable, and that the Incumbent ſhall be deprived by the Founder and his Heirs.

(2.) As to the other, there have been peculiar Privileges granted to Lords of Mannors, who had ſeveral Tenants living remote from the Church to erect Chappels for them, and ſome for the conveniency of ſuch Lords and their Families, with liberty to put in whom they would, ſo as he was a Man in Holy Orders, and the Biſhops in thoſe days granted theſe Privileges to encourage ſo good an Undertaking, which having been continued time out of mind, do now turn to a Preſcription.

---

* 1 Jac. cap. 11. † Bro. Abr. 254. Plito 9. ‡ Bro. Abr. fol. 224. Plito 1.

There are ſome but not many of theſe Donatives in *England*, and they differ in every thing from other Eccleſiaſtical Livings, as for inſtance.

They are not preſentable unleſs made ſo by the Patron, (*a*) but if he will preſent to the Biſhop, and his Clerk ſhould be admitted, inſtituted and inducted upon ſuch Preſentation, it ſhall never be a Donative afterwards, but ſubject to the Juriſdiction of the Ordinary, and in all other caſes ſhall be like other Church Livings, but this muſt be underſtood where ſuch Preſentation is made by the rightful Patron, for if 'tis done by a Stranger, tho' his Clerk ſhould be inſtituted and inducted, yet it ſhall not make it preſentative, becauſe a Preſentation by Uſurpation in the caſe of a Donative is void in it ſelf, for that is not preſentable unleſs by the true Patron.

'Tis not ſubject to a Lapſe, either to the Biſhop or the Queen, but the Patron may be compelled by Eccleſiaſtical Cenſures to fill the Church, and when 'tis full the incumbent muſt ſubſcribe the Declaration, and take the Oaths enjoined by the Statutes (*b*) as all other Clergy-men are bound to do; and if 'tis a Benefice with *cure of Souls*, he muſt ſubſcribe the 39 Articles.

But it hath been a Queſtion whether a Donative can be a Benefice *with cure, &c.* becauſe in the ſtrict acceptation of that word, it ſignifies a Living which is gained by Inſtitution and Induction, which is agreeable to the (*c*) Canon Law, (*viz.*) that all Eccleſiaſtical Livings ſhall be had by Inſtitution either by the Biſhop or his Chancellor, or by thoſe who have Epiſcopal Juriſdiction, and without ſuch Inſtitution a Benefice can neither be lawfully had or retained, but there are ſome Inſtances to the contrary.

For the Church of the *Tower of London* is a Donative, and in the Queen's Gift, and 'tis a Benefice with cure of Souls, and the Incumbent comes in without inſtitution, *&c.*

Neither doth every Inſtitution ſuppoſe a *cure a Souls*, for the Queen hath ſeveral Donatives in *Wales* (*d*), but yet the incumbents are inſtituted by their reſpective Ordinaries.

The Deans of Cathedrals do not come to their Deanries by Inſtitution, and in that they reſemble Donatives, but they are not ſo, becauſe they are ſubject to Epiſcopal Viſitations; beſides, their Grants of any of their Poſſeſſions muſt be confirmed by the Biſhop and Chapter, tho' the Queen is Patro-

(*a*) Co. Lit. 344. 2 Roll. Abr. 342. (*b*) 14 Car. 2. 1 W. & M. (*c*) Decret. Lib. 3. (*d*) Sid. 427.

neſs

neſs of the Deanry, but Grants made by incumbents of Donatives muſt be confirmed by the Patron.

As to the Patrons being compelled to preſent by Eccleſiaſtical Cenſures, my Lord *Rolls* (*e*) tells us, that it was adjudged to the contrary in *Fairchild* and *Gayre*'s Caſe, that the Ordinary may ſequeſter the Living in caſe of refuſal, and that he may deprive the incumbent if he ſees juſt cauſe, in both which points I think he is miſtaken.

This caſe is reported in ſeveral Books, which I have peruſed and can find no ſuch thing (*f*), but rather the contrary, for *Juſtice Croke* doth not mention either the ſequeſtration of the Profits, or deprivation of the Incumbent: *Brownlow* hath tranſcribed this caſe out of *Yelverton*, *verbatim*, where we find the Chief Juſtice *Popham* of Opinion, that if an Incumbent of a Donative preaches Hereſy, the Ordinary may correct him, for his Perſon is not exempted from that Juriſdiction tho' the place is.

But the other Judges were of a contrary Opinion, (*viz.*) that his Perſon is privileged by reaſon of the place; that the Patron and not the Ordinary may deprive him if he hath a juſt Cauſe ſo to do, and ſo 'tis in *Serjeant Moor*'s Report, (*viz.*) That he is ſubject to the Viſitation and Correction of the Patron, but neither of them ſpeak any thing of a ſequeſtration by the Ordinary.

'Tis therefore the undoubted right of the Patron to viſit and deprive; but if the incumbent will reſign, it muſt be to him and not to the Ordinary, and if he is diſturbed in collating his Clerk, he may have a *Quare impedit* againſt the Biſhop and the Diſturber, but that would be to admit himſelf out of Poſſeſſion, and therefore 'tis more adviſable to try the right in an Ejectment or in an Action of Treſpaſs, in which the Plaintiff muſt certainly recover, becauſe a Donative cannot be filled by Preſentation.

But if he ſhould recover in a *Quere impedit* the Writ muſt be directed to the Sheriff to put the Clerk in Poſſeſſion.

Now this right which the Patron hath to viſit comes thus, (*viz.*) if the Queen doth found a Church or Chappel, ſhe may exempt it from the Viſitation of the Biſhop, and in ſuch caſe the Lord Chancellor may viſit by vertue of a Special Commiſſion for that purpoſe; But if ſhe gives Licenſe to a Subject to found a Church or Chappel, and exempts it from the Juriſdiction of the Ordinary; 'tis viſitable by the Foun-

(*e*) 1 Roll. Rep. 453. (*f*) Cro. Eliz. 653. 2 Cro. 63. Yel. 60. Moor 765. 1 Brownl. 201.

der and his Heirs, and this was the original of all the Donatives in *England*.

Duplex Querela.

AS the Patron hath a remedy at Law by a *Quare impedit*, where a Biſhop refuſes to inſtitute the Perſon preſented, ſo likewiſe the Clerk hath a proper remedy in the Eccleſiaſtical Court, for he may complain to the Arches if he is refuſed by a Biſhop, and to the Delegates where the refuſal is by the Archbiſhop; and upon this Complaint, the Dean of the Arches writes to the Biſhop *in forma juris*, which writing is called *Duplex querela*.

But becauſe by the Canon * the Biſhop hath 28 days to inform himſelf of the ſufficiency of the Clerk after the preſentation is tendered to him, therefore by the ſame Canon 'tis enjoined that a *Duplex querela* ſhall not be granted till that time is expired, and Oath made thereof, and that the Biſhop refuſed to grant Inſtitution, or enter into Bond with Sureties to prove the ſame to be true, and this under pain of Suſpenſion of the Grantor from the Execution of his Office for half a Year, to be denounced by the Archbiſhop, and that the *Duplex querela* ſhall be void, in which Canon there is a proviſo that the Biſhop ſhall not inſtitute another in the mean time with prejudice to the perſon preſented *ſub pœna nullitatis*.

As to the form of this Reſcript, and the proceedings on it 'tis as followeth.

'Tis to contain a Monition that within five or nine days the Biſhop ſhould admit the party complaining, and alſo a citation for him to appear by himſelf or Proctor at another day, in caſe he ſhould refuſe ſo to do, and then to ſhew cauſe of his refuſal, there is alſo an Inhibition to him purſuant to the Canon before mentioned, not to admit another *pendente lite*.

The proceedings upon it are thus, *viz.* the Clerk who hath got the Preſentation muſt procure ſome Perſon to admoniſh the Biſhop to admit him within the time mentioned in the *Duplex querela*, and three days afterwards the ſaid Clerk ought to apply himſelf to the Biſhop and pray inſtitution, and tender himſelf to ſubſcribe the 39 Articles, and to take the Oaths of Supremacy and Canonical Obedience, and this he ought to do twice more *infra dies præſcriptos in duplici querela*, and if he cannot be admitted to the preſence of the Biſhop, then he ought to make his Proteſtation in the preſence of ſome credible Witneſſes.

* Can. 95.

The

The Biſhop after ſuch Admonition, refuſing to admit the Clerk may be cited by a Meſſenger to appear, and if that cannot be done perſonally, then the Meſſenger may acquaint the Biſhop's Servants, that he hath ſuch a Citation *ad Inſtantiam R. B.* to inſtitute him to ſuch a Benefice.

Then after the day on which he ſhould have appear'd, if he had been perſonally cited the Court will decree a Citation *viis & modis*, which muſt be perſonally executed if that can be done, if not, then it muſt be fixed to the outward Doors of his Palace, Houſe, or Cathedral.

Afterwards the day of executing the Monition and the Inhibition, the ſeveral days on which the Clerk praied Inſtitution, the day of his citing the Biſhop and of his refuſal to admit, *&c.* are to be certified by the Perſon citing, and this is to be done on the back of the *Duplex querela.*

Then the Biſhop after three Proclamations is adjudged *Contumax*, and the Judge pronounces the right of Inſtitution to be divolved on him, and decrees that the Clerk ſhall be inſtituted, and that he will write to the Archdeacon to induct him.

Then the Clerk muſt apply himſelf to the Archbiſhop to examine him, and if he approves him, then he writes to the Judge *fiat inſtitutio*, but before he is inſtituted 'tis uſual for the Clerk to give Bond to indemnifie the Judge.

If the Biſhop doth appear and alledge a Cauſe of his refuſal to admit the Perſon, as that the Church is full, or that the Perſon preſented is a Simonaick, unlearned, *&c.* then they are to proceed to Tryal, and if the Biſhop fails in his proof, then the Judge pronounces Sentence for his own Juriſdiction, and condemns the Biſhop in Coſts.

But if the Biſhop will not defend the Suit, the pretended Incumbent may do it, and alledge that the Church is full of himſelf, but then the Judge will firſt pronounce Sentence for his own Juriſdiction, becauſe the Biſhop hath alledged nothing to oppoſe it.

But if the Biſhop will allow ſuch Incumbent to defend the Suit in his own name, then the Judge cannot decree for his own Juriſdiction until the Cauſe is determined.

And in this caſe where the Biſhop appears and refuſes to inſtitute, 'tis not a ſufficient cauſe for him to alledge that two Perſons are preſented to the ſame Living, and ſo the Church is become litigious, becauſe, if it was ſo, he ought to proceed upon a *jus patronatus* to try the right, but if not, and one of them appears to the Judge to be incapable or otherwiſe deficient, he may admit the other without any Inquiſition upon

on a *jus patronatus*, becauſe the right of Inſtitution is *pro hac vice* devolved on him through the negligence of the Biſhop.

There are not many inſtances of this way of proceeding in our Books, ſome there are.

Sir *Timothy Hutton*'s (*g*) Clerk was inſtituted by the Archbiſhop of *York*, and inducted by his Warrant upon the refuſal of the Biſhop of *Cheſter* to admit him.

'Tis true, there was another preſented to the Church who ſued the Incumbent in the Delegates, ſuggeſting that his Inſtitution was void, becauſe it was done by the Archbiſhop out of his Provence in time of Parliament at *Weſtminſter*, and by conſequence the induction muſt be void, but a Prohibition was granted, becauſe the Church was full by induction which is a temporal Act, and which ſhall never be avoided but by a Suit in the Temporal Courts:

Therefore a *Duplex querela* will not be a proper remedy where another Perſon is inducted, but if two Patrons pretending a Title (*h*) to preſent, do each of them grant a Preſentation to his Clerk, and the Biſhop refuſeth one who brings his *Duplex querela*, and upon that obtains Inſtitution and Induction, and afterwards the Biſhop grants Inſtitution to the other, the Suit ſhall ſtill go on in the Spiritual Court to puniſh the Biſhop for a contempt in granting Inſtitution after an Inhibition, and *pendente lite*, but *quoad* the incumbency a Prohibition was granded.

But in ſuch caſe (*i*) if the Biſhop had refuſed both their Clerks, and then one of the Patrons had brought a *Quare impedit* againſt him, and pending that Writ a *Duplex querela* had been brought by the other, and upon the neglect of the Biſhop to appear, the Archbiſhop had granted Inſtitution to the Clerk of that Patron, tho' he had been Incumbent for ſix Months, yet he ſhould be removed if the other Patron recover in the *Quare impedit* becauſe he came in *pendente lite*.

This way of proceeding againſt the Biſhop is proper where the refuſal is for incapacity or any other perſonal defect in the Clerk, becauſe thoſe are Cauſes which the Spiritual Judge may try.

So if the refuſal is upon pretence that the Church is full, becauſe the plenarty ariſing upon Inſtitution ſhall be tried by the Certificate of the Biſhop.

(*g*) Hob. 15. Moor 572. (*h*) Moor 879. 1 Leon. 181. (*i*) 2 Roll. Abr. 391

Eccleſiaſtical

Eccleſiaſtical Law. See *Canons.*

THO' the Common Law is diſtinct from the Eccleſiaſtical, yet 'tis not excluſive of it, for both are conſiſtent with the Rights and Liberties of the People, and both are eſtabliſhed upon the ſame Foundation, for as the Common Law by which our Civil Rights are determined, is made up of ſuch Cuſtoms which by the general conſent of the People, have time out of mind obtained the force of Laws, ſo the Eccleſiaſtical Law is made up of ſuch Canons and Conſtitutions which have been received and approved by the People, and which by immemorial practiſe have been uſed in our National Church.

This Church is divided into two Provences and governed by two Archbiſhops, who have a right to conſecrate ſuffragan Biſhops, to viſit each Dioceſs within their reſpective Provences in ſuch manner as is ſettled by Cuſtom, the right of receiving Appeals in Eccleſiaſtical Cauſes, the cuſtody of vacant Sees, *&c.*

Then the Biſhops in each Dioceſs have a right of Juriſdiction over their Clergy which is as ancient as Chriſtianity it ſelf, for as ſoon as a Church was built, there was a Biſhop ſet over it who had Authority to proceed againſt the Clergy according to the Canons.

And to ſhew that the Common Law doth not exclude the Spiritual Law, 'tis to be obſerved, that when it was reſtored to our Anceſtors by the *Magna Charta of King John*, the very firſt Paragraph of that Charter ſecures the Rights and Liberties of the Church, that is as my Lord *Coke* (*k*) tells us all their lawful Juriſdictions.

Now admitting that by *Magna Charta* it appears, that 'tis the fundamental right of the People to be tried by their Peers, that is, by Juries which is not uſed in the Spiritual Courts, yet this is no Argument that the proceedings in thoſe Courts are inconſiſtent with our Rights, for if it ſhould, the ſame may be alledged againſt the Courts of Equity and Admiralty, who do not proceed according to the courſe of Common Law.

'Tis true theſe words *in Magna Charta, Nec ſuper eum ibimus nec mittemus niſi per legale judicium parium ſuorum* muſt relate to Trials by Juries, but then thoſe words which immediately follow, (*viz.*) *vel per legem terræ* muſt extend to any

(*k*) 2 Inſt. 3.

other

other customary way of trial allowed by the Law of the Land.

We often say, that such a thing is so at Common Law, by which we really mean, that it was so according to the feudal Law received here, which was originally instituted to keep the People under a military Service, and tho' it was a Law which had its rise from abroad, yet 'tis become part of the Common Law by being generally received here, as for instance, 'tis part of the Common Law that Lands of Inheritance shall lineally descend; this is agreeable to the fendal Law, because it was to go to him who was most likely to perform some military Service.

I must confess, my Lord *Coke* gives another reason for it (*l*), and 'tis a very weighty one, for he tells, that Lands descend, because they are ponderous, which reason would hold in *Holland* as well as here, but there 'tis otherwise.

'Tis after this manner that several Canons made in Foreign Nations are now become part of the Laws of this Land, not by vertue of any Authority from the Pope or any other Potentate, but by being received time out of mind, and allowed to pass for Law amongst us, which together with those ancient Canons made in provincial Councils at home, and which have been received by a general consent, do make up the body of the Ecclesiastical Laws of this Realm.

Examination. See *Bishop.* *Exchange of Benefices.* See *Resignation.*

Excommunication.

'TIS certain this is a punishment which for many Ages hath been used in the Church by removing scandalous and wicked Persons from receiving the Sacraments, and from the fellowship of Christians in general, and that the Sentence was usually pronounced by the Bishop himself, and that after Ecclesiastical Courts were established, it was always given in those Courts.

And tho' by the depravity of this Age; this Discipline is so much despised, that 'tis lookt upon to be no more than *Brutum fulmen*, yet the Sentence it self is not the less dreadful, for being contemned by Men of corrupt Principles, who had rather live in their sins then be reformed by Pennance.

(*l*) In Ratcliffe's Case.

'Tis

'Tis a true obſervation, that thoſe Perſons who are the moſt profligate in their Morals, who make a jeſt of Religion, and who live ſecurely in ſin and folly, are likewiſe the only Men who repreſent the cenſures of the Church to be inſignificant Trifles, when the wiſer part of mankind do believe that ſuch cenſures are abſolutely neceſſary, even upon the principals of *natural Reaſon*; for they were practiſed by the Gentiles, who had no other light to direct them, and likewiſe the Jews themſelves, to whom the will of God was revealed, and afterwards introduced into the Church by our Saviour himſelf.

As to the Gentiles, it muſt be admitted, that Government is abſolutely neceſſary in all manner of Societies, and that 'tis impoſſible they ſhould ſubſiſt without a power lodged ſomewhere to puniſh thoſe Perſons, who break the Rules and Orders by which the Government ſhould be preſerved.

Therefore, amongſt the Heathens, who had forms of Government in their Idolatrous Aſſemblies, there are ſeveral inſtances of their Prieſts, excluding wicked Perſons from the Sacrifices, and this was only by the inſtigation of natural Reaſon; Thus *Lucan* tells us of *Peon*.

Solitus templis arcere nocentes.

And *Virgil*'s Prieſts, when they were about to Sacrifice to their Gods, made publick Proclamation to the People,

——— *Procul, oh procul eſte prophani!*
——— *Totoq; abſiſte Luco.*

And this Monitory Excommunication was held ſo Sacred amongſt them, that not a Man dared be preſent at the Sacrifice, who was conſcious to himſelf that he was then under the guilt of any notorious Crime.

To come nearer home, the *Druids*, who were the chief Prieſts amongſt the Barbarous *Gauls*, forbid thoſe Perſons who diſobeyed their decrees to approach their Sacrifices, and this was eſteemed in thoſe days to be the greateſt puniſhment that thoſe Heathens could inflict on the Offenders, for they loſt all converſation amongſt Men, and were deprived of the benefit of the Law.

Then as to the Jews, ſome Men are of opinion, that what was done in the Patriarchial times was to be a guide to them when they became the peculiar People of God: Therefore, the caſting *Adam* out of Paradice, the grievous cenſure upon *Cain*, the curſe of *Noah* upon *Cham*, for deſpiſing his Father, and that of *Jacob* upon his two Sons, *Simeon* and *Levi*, who had murthered the *Shechemites*; theſe and many more inſtances ſhew that God would have notorious Offenders caſt out of his preſence, and that ſuch were not worthy of the company of his People. 'Tis

'Tis very true, there are not many inſtances of Excommunications under the Ceremonial Law, ſome there are, as that of the (a) Tribes of *Benjamin*, which was pronounced in a Religious Aſſembly to be accurſed, and the People obliged themſelves by a Solemn Oath not to converſe with them.

Now, the true reaſon why we have ſo few inſtances of Excommunications, under that Law, may be, becauſe the Government amongſt the Jews was then a *Theocracy*. There was no manner of diſtinction between Temporal and Spiritual Courts, for the Prieſts were veſted with a power to puniſh all Offenders, and ſome were puniſhed by God himſelf in a peculiar manner, *viz.* by ſtriking them with Leproſies as he did *Miriam*, *Uzziah*, *Gehazi*, *&c.* and this was an effectual Excommunication, becauſe by the Jewiſh Law, ſuch Leprous Perſons were always excluded the Congregation of the Faithful.

Sometimes he puniſhed Men with ſudden Death, as *Corah* and his Companions; ſo that it was not neceſſary for the Prieſts always to interpoſe, and by their power to Excommunicate Immoral and Scandalous Men, becauſe God himſelf often inflicted the puniſhment on them:

Beſides, whilſt the Jews were thus governed, all little Offences were expiated by Sacrifices, and the Prieſt reconciled the Offender to God and the Church; and where God did not immediately puniſh for great Offences, the Prieſt always pronounced his Sentence, which ſhew'd it was the Divine Will, that whilſt the Jews were under the State of *Theocracy*, lewd and vitious Perſons ſhould be puniſhed by thoſe who were the Governors of the Church.

After the Birth of Chriſt, and when the Jews became Tributory to the Romans, we find that the chief Men amongſt them decreed, whoſoever confeſſed Chriſt ſhould be Excommunicated.

This made ſeveral of the *Sanhedrin* afraid, leaſt they ſhould be caſt out of the Synagogue, and that was a puniſhment by which Men were excluded from all Religious as well as Civil Converſation.

I know Mr. *Selden* would have this caſting out of the Synagogue to be a puniſhment inflicted by the Temporal Magiſtrate, and to be only an interdict from Civil Commerce, becauſe Temporal Affairs were tranſacted there.

But the very notion of the word is enough to convince one that the caſting out of the the Synagogue was an interdict from

(a) Judg. 20. 12.

Religious

Religious Aſſemblies, becauſe at firſt that was a place peculiarly ſet apart for Religious Worſhip, and always uſed for that purpoſe, till the Jews were made ſubject to the Romans, and then ſome cauſes which they were unwilling to have redreſſed by thoſe Heathens were privately determined amongſt themſelves in their Synagogues, and ſometimes offenders were puniſhed there by Whipping.

But this was contrary to the Eſtabliſhed uſage and Cuſtom, for thoſe were certainly places of Religious Worſhip, our Saviour himſelf takes notice that the Phariſees ſtood Praying in their Synagogues; and becauſe throughout the whole Land of *Canaan* there was but one great Temple, where all the Jews aſſembled at ſome Solemn times in the Year, therefore it was neceſſary that the leſſer places ſhould be ſet apart for Religious Woſhip all the reſt of the Year, and thoſe were their Synagogues.

Amongſt the Chriſtians there is a Church compoſed of a Society or Corporation of Perſons Converted at firſt by our Saviour and his Apoſtles, to whom he gave the Government of that Society, and Laws and Rules diſtinct from the Civil State, and as in all other Governments, ſo in this of the Church 'tis natural that a Power ſhould be lodged at firſt in thoſe Spiritual Governors, and afterwards in their Succeſſors, to puniſh thoſe who tranſgreſs againſt thoſe Rules.

Therefore, when St. *Peter*, in the name of the reſt of the Apoſtles, acknowledged Chriſt to be the Son of God, he replied, thou art *Peter*, (which word in the Original ſignifies a Rock) upon which Rock (that is, upon the confeſſion of his Faith in Chriſt) he would build his Church, and then tells him that he would give them the Keys of the Kingdom of Heaven, and that whoſoever he ſhould bind in Earth ſhould be bound in Heaven.

'Tis probable our Saviour might uſe this Metaphor of the Keys, becauſe the Church is uſually compared to a Houſe, the Keys whereof belong to him who hath the chief care of the Family; ſo that the Keys which he gave to St. *Peter* and his Succeſſors, was only a power to admit ſome Perſons into the Church, and exclude others by Excommunicating them from the company of the Faithful, and ſince he gave them no Temporal Power, 'tis evident they have no other method to puniſh Offenders, but by turning them out of the Communion of the Church, and this is not ſuch an inſignificant puniſhment as ſome Men fancy, for our Saviour poſitively, and without a Metaphor, tells us, that whoſoever ſins they remit, ſhall be remitted, and whoſoever they retain ſhall be retained.

Now,

Now, the beſt Expoſitors of theſe words tells us, that by the pronoune (*they*) the Governors of the Church are ſignified, that by remiſſion is meant an abſolution upon Repentance, and by retaining we muſt underſtand a continuing impenitent, and ſo not capable of a Pardon under the guilt of Sins.

So that where the Governors of the Church ground their cenſures upon a Doctrine which is true, and if it appears ſo to the Perſon himſelf who is cenſured, and yet he will obſtinately deſpiſe it, in ſuch Caſe he deſpiſes the Miniſters of Chriſt who ſent them, in whoſe name, and by whoſe authority the Sentence was pronounced.

This being the original of Excommunication, I ſhall now ſhew that it hath been practiſed ever ſince in the Chriſtian Church; and that St. *Peter*, to whom this power was firſt given, was the firſt who executed it, upon *Symon Magus*, for his Hypocriſie; he was Baptized, and pretended to be a Believer, but it was to no other purpoſe but that he might purchaſe of the Apoſtles a power of doing Miracles, for which he offered his Money, but St. *Peter* curſed him and his Money, and told him that he had neither part or fellowſhip with them.

In like manner St. *Paul* delivered *Hymeneus* and *Alexander* unto Satan, and ordered the inceſtuous Perſon at *Corinth* who had brought ſuch a Scandal upon the Chriſtian Religion, to be delivered likewiſe to Satan, which was the form of Excommunication then uſed, and for a long time afterwards.

The Apoſtles after they had planted Churches took care to veſt the Biſhops whom they placed there with this power, and they executed it in the pureſt Ages, upon *Cerdon* and *Marcion*, and ſuch other Heretieks who lived ſoon after them; and this they did a long time before the Empire became Chriſtian, and by conſequence before they had any power or aſſiſtance from the Temporal Magiſtrate.

It was then that the nature of this Church Power was beſt underſtood, and as it was never uſed by the Apoſtles but upon great and extraordinary occaſions, as upon thoſe who Preached another Goſpel, and upon ſuch who did not love the Lord, ſo it was never practiſed by thoſe primite Biſhops but upon Apoſtates, Heriticks and other very Scandalous Perſons, whom they would not ſuffer to be in their Communion, till by a ſober and ſolemn profeſſion of their Repentance, they were readmitted to ſome part of Religious Worſhip, but they were not ſuffered to ſtand amongſt the reſt till they had paſſed thro' ſeveral degrees of Pennance, and ſo were gradually received into the Church.

Se

So that this power is for Edification, and not for Deſtruction, and never to be uſed but upon ſuch Sinners who are wilful and obſtinate, and who live in a deliberate contempt to the Rules and Orders of the Church; and thoſe Biſhops who were at firſt veſted with this Power, and their Succeſſors, for many Ages, kept within the bounds of their Spiritual Juriſdiction; they were always obedient themſelves to Magiſtrates, and never aſſumed any coercive power over the Eſtates or Bodies of Men. Pope *Gregory* VII. called *Hildebrand*, was the firſt who made uſe of it, by depoſing *Hen.* 4. and this was not till the 11th Centnry, and in the Reign of our *William* called the Conqueror.

We have a famous inſtance as to this matter, in the Caſe of *Paulus Samoſatenſis*, who was d:poſed from his Biſhoprick by the Council of *Antioch*, but he ſtill kept poſſeſſion of the Palace, and the Fathers of that Council did not pretend to remove him, for that was done by the aſſiſtance of the Emperor *Aurelian*.

And 'tis obſervable, that thoſe Biſhops had never greater reverence then when they alone exerciſed this Spiritual Power of Excommunication, for then the Chriſtians paid them ſo much reſpect, that they never travelled into Foreign Parts without Credentials from their proper Biſhops; ſome of which were called *Commendatory Epiſtles*, and thoſe were granted to Perſons of note and diſtinction; ſome were called *Communicatory Epiſtles*, and thoſe were granted to ſuch Perſons who were in the Communion of the Church, and ſome were called *Epiſtolæ Dimiſſoriæ*, and thoſe were granted to the Clergy when they were to ſettle themſelves under another Biſhop, and all theſe Epiſtles were comprehended under the general name of *Literæ Formatæ*, becauſe they were written in a peculiar Form and Character.

'Tis a vain objection to alledge, that ſince the Empire became Chriſtian, the Civil Magiſtrate had a Power to puniſh all Crimes; ſo that now there is no neceſſity of Excommunication by the Church, for 'tis certain, that after *Conſtantines* time, the Biſhops did Excommunicate without any aſſiſtance from the Magiſtrate, and *Arrius* himſelf was firſt Excommunicated by the Biſhop of *Alexandria*, before any Application was made to the Emperor.

This was the conſtant practiſe when Chriſtianity was encouraged, and when it was under no manner of Perſecution, and in conformity to this practiſe it was declared by ſeveral Councils, that it was a power legally veſted in Biſhops, but becauſe they might be ſubject to miſtakes, therefore Appeals

were decreed from their cenſures to a Synod, but never to the Emperor.

But as Animoſities about different Opinions encreaſed, and when Men became formed into Parties, then they Excommunicated one another for little matters, in which they differed, till at laſt Excommunication had not that awe upon Men as it had at firſt, and ſo by degrees the Authority of the Sentence came to be deſpiſed.

Then alſo the Spiritual and Temporal Courts did, by turns, encroach upon each other, which was never attempted before. 'Tis true, Princes had put reſtraints upon the exceſs of this Power, by Eccleſiaſtical Courts, and particularly here in *England*; for *William* called the Conqueror, would not ſuffer any of his Miniſters to be Excommunicated, without notice given to himſelf, becauſe it might probably fall upon a Perſon whoſe ſervice might be neceſſary to ſupport him in his new acquired Dominions.

But when once Diſputes came to be managed by cunning Civilians and Canoniſts, then various Caſes of Excommunication were brought into the Spiritual Courts, diſtinct from the ancient method and practiſe, ſo that the Church hath long groaned under the intricacies of the Canon Law.

Excommunication was then divided into *majorem & minorem*; by the one the Party is deprived of the Sacraments, and dying under the Sentence is not to have Chriſtian Burial, but then by the (*a*) Canon he muſt be denounced to be Excommunicated.

By the other he is deprived of the Sacraments and Divine Worſhip, and this latter Sentence is frequently uſed for Obſtinacy, diſobedience in not appearing upon Citations, or not ſubmitting to the injunctions of the Court, or for coſts of Suit, Proctors Fees, or for ſome other ſmall Offences; as for inſtance, in the (*b*) Reign of *Edw.* 3. the Biſhop of *Hereford* Excommunicated every Man who ſhould Hunt in his Woods, Parks, Chaces or Warrens, in *Malverne*, and catch Hares, Conies or Pheaſants there, or elſewhere in his Dioceſs.

This and many more Excommunications for ſuch frivolous matters, made the People inſenſible of the danger of ſuch cenſures; the contempt whereof hath gradually encreaſed for many Ages, inſomuch, that the Commiſſioners in *Edw.* 6. Reign, who were to reform the Eccleſiaſtical Laws, amongſt the reſt, thought it proper to reduce Excommunication nearer to its primitive inſtitution, and therefore they were of opinion

(*a*) Canon 68. (*b*) 2 Rol. Abr. 177.

that

that it never ought to be denounced, but for obſtinacy in great Faults, and that the Judge who was to give the Sentence ſhould be aſſiſted by a Juſtice of the Peace, and the Miniſter of the Pariſh where the offender lived, together with two or three more learned Presbyters, in whoſe preſence the cauſe was to be examined, and then Sentence might be given, and afterwards put into Writing, and tranſmitted to the Miniſter of the Pariſh, *&c.* and to ſome neighbouring Miniſter, and then no Perſon was to Eat or Drink with him, except his own Family, and if they did, being admoniſhed to the contrary, they were alſo to be Excommunicated; and if the offender continued 40 days under the Sentence without ſhewing any Repentance, then the Biſhop was to certifie it into the Chancery, upon which Certificate the Writ *de Excomunicato Capiendo* was to be Iſſued, and always directed to the Sheriff, by virtue whereof the Perſon was to be taken, and committed without Bail, until he conform, and he could never avoid this Sentence by an Appeal, becauſe the legality of it is to be detetermined by an Eccleſiaſtical Judge.

Before I ſhall particularly Treat of this Certificate, and the Writ, which is grounded upon it, I muſt take notice of another ſort of Excommunication invented, by the Canoniſts, which is mentioned likewiſe in our (*a*) Statutes, and that is an Excommunication *ipſo facto*, which is *major Excomunicatio*, for 'tis a Rule amongſt them, that *Excomunicatio ſimpliciter prolata intelligendum eſt de majori.*

Now, tho' in this Caſe the Party is both by the Canon and Statute really and in fact Excommunicated, without any formal Sentence, yet ſuch an Excommunication hath no effect at Common Law, without a declaratory Sentence pronounced by an Eccleſiaſtical Judge.

I grant, that ſome Sentences of Excommunication have been denounced in Parliament, as againſt the infringers of *Magna Charta*, which, tho' done in a Secular Court, yet is not altogether the Sentence of Laymen; for it might be their agreement to the Opinions of the Biſhops, who were then aſſembled in Parliament.

So, ſtriking in the Church or Churchyard is Excommunication *ipſo facto*, by the Statute of 5 & 6. *Edw.* 6. but this is not only a Confirmation of many Canons, but tends purely to the Peace of the Church.

Upon the whole matter, Excommunication is a puniſhment which hath been always uſed in the Church to reform

(*a*) 5 & 6. Edw. 6. Dyer 275. 1 Vent. 146.

Offenders, 'tis neceſſary upon the principles of natural Reaſon, for it was practiſed by the Gentiles who had no other light to direct them, and tho' there are not many inſtances of this Puniſhment under the Moſaical Diſpenſation, it was, becauſe the Government of the Jews was then a *Theocracy*, and the Offenders were puniſhed by God himſelf.

That under the Goſpel Diſpenſation our Saviour gave the Power of the Keys to St. *Peter*, that he might admit ſome and Excommunicate others out of the Church; that St. *Peter* executed this cenſure upon *Symon Magus*, and that St. *Paul* did the like upon *Hymeneus* and *Alexander*, and the Inceſtuous Perſon at *Corinth*.

That the Apoſtles veſted the primitive Biſhops with this power which they practiſed in the firſt and pureſt Ages of the Church upon Hereticks, Apoſtates, and for other grievous Offences, and that whilſt the Biſhops exerciſed this Spiritual Juriſdiction only in extraordinary Caſes, the People did not only reverence their Perſons, but ſtood in greater awe of the Sentence, by reaſon of the Authority of him who denounced it.

But when they aſſumed an exorbitant Power over the Perſons and Eſtates of Men, when they called upon the Civil Magiſtrate to aſſiſt them, which afterwards was the occaſion that the Spiritual and Temporal Courts encroached upon each other in point of Juriſdiction, when the Canoniſts had invented ſo many ſorts of Excommunication that they made it intricate, and animoſities encreaſing amongſt different Parties, that they Excommunicated one another for trifles. This was ſuch a derogation from its primitive Inſtitution, that the Sentence came to be deſpiſed by Men of diſorderly Principles, and not to carry that awe with it as it did at firſt:

However, the Church is ſtill veſted with this Power, and particularly amongſt us; and the Temporal Courts never grant Prohibitions in caſes of Excommunication.

This appears by the Parliament *Anno 9 Ed.* 2. in which it was enacted, That Excommunicated Perſons ſhould not be replevied by the Kings Writ, and by the Statute *circumſpecte agatis* (*a*) which prohibites the temporal Courts to puniſh the Clergy for inflicting Pennance enjoined by Prelates for Fornication, Adultery, *&c.* and by the Charter of *Ed.* 2. which declares that Letters ſhall never be ſent to the Ordinary to abſolve any Perſon from Excommunication, but where 'tis againſt his prerogative.

(*a*) 13 Edw. 1.

And

And tho' our Kings have ſometimes ſent their Mandatory Writs to Biſhops to compel them to revoak Excommunications, yet it was never done, but in caſes where they had abuſed their Power to the oppreſſion of the Subject.

I ſhall now mention ſomething concerning,

(1.) The effect of Excommunication by our Law.
(2.) The nature of the Certificate or *Significavit*.
(3.) The Writ *de Excommunicato capiendo*.
(4.) The Writ *de Cautione admittenda*.

(1.) As to the firſt of theſe particulars 'tis held, that whilſt a Perſon is under this Sentence he cannot commence a Suit at Law, yet he may defend any Action that ſhall be brought againſt him, ſo he may Marry or make a Will.

He may not enter the Church in time of Divine Service, but he may hear the word preached. My Lord *Coke* (*b*) ſeems to intimate, that an Excommunication is a greater diſability than an Outlawry, for if a Plaintiff who is an Executor is Outlawed, that cannot be pleaded to diſable him from proceeding in his Suit, becauſe 'tis in the right of another, but if he is Excommunicated 'tis otherwiſe, becauſe every Man who converſeth with ſuch a Perſon is Excommunicated himſelf.

But this ſeems to be a miſtake, for they are not Excommunicated till admoniſhed not to converſe with him.

So likewiſe where there are three Executors (*c*), and one is Excommunicated, and in an Action of Debt brought by them all, the Excommunication of one is pleaded in *Abatement*, this *ſuſpends*, but it doth not *abate* the Action.

But regularly the Plea ought not to be concluded in Abatement *quod petit judicium de Breve* (*d*), but thus, (*viz.*) *petit judicium ſi reſpondere debeat*, or thus, *ſuper quo* the Defendant *petit quod loquela pred. remaneat ſine die*, becauſe, tho' the party is Excommunicated, yet the Writ is not abated, for he may get Abſolution and have a re-attachment upon the ſame Original.

Now when an Excommunication is pleaded, the *Significavit* (*e*) muſt be ſet forth *ſub pede ſigilli*, 'tis the expreſs Text of *Littleton* (*f*), unleſs the Writ had iſſued out of the ſame Court in which the Excommunication was pleaded, and the reaſon is, becauſe it may appear that the perſon is certainly Excommunicated, but 'tis ſufficient to alledge that the Party was Excommunicated (*g*) *Et protulit hic in Curia literas*

(*b*) 1 Inſt. 134. (*c*) 3 Lev. 268. (*d*) Co. Lit. 128, 3 Lev. 134. (*e*) 1 Lut. 18. (*f*) Litt. Sect. 201. (*g*) 1 Vent. 222.

Teſtimentarias Epiſcopi & quæ notum faciant univerſis quod ſcrutatis regiſteriis, &c. tho' this is not ſo poſitive as if it had been pleaded under the Seal of the Biſhop.

Significavit.] (2.) As to the *Significavit.* When a Perſon is Excommunicated it muſt be publiſhed in the Church by the Miniſter of that place where the party lives, he being required by an Inſtrument under the Seal of the Court ſo do to, and if the Offender continueth obſtinate under that Sentence for 40 days, then the Biſhop of the Dioceſs certifies it to the Queen in Chancery, which if he refuſeth, he may be compelled by the Archbiſhop of the Provence and this is called the *Significavit.*

It muſt be under the Seal of the Biſhop and not of his Official (*b*), becauſe none can certifie this matter but the Perſon to whom the Court may write to abſolve; yet in ſome places it may be good by Cuſtom under the Seal of the Archdeacon, but then it muſt appear that the matter was within his Juriſdiction.

But be it under whoſe Seal it will, it muſt expreſs the cauſe for which the Perſon was Excommunicated, that it may appear the Eccleſiaſtical Court had Juriſdiction (*i*), and therefore if it ſets forth, it was for not anſwering Articles, or for certain Cauſes without mentioning what Cauſes, 'tis void for incertainty.

The Biſhop muſt ſet forth, that the Party (*k*) was reſident in his Dioceſs at the time of the Excommunication, and the Certificate muſt ſhew in what (*l*) Court he was Excommunicated.

It muſt likewiſe ſet forth the day on (*m*) which he was Excommunicated, becauſe 'tis traverſable: See more of this in *Capias* following.

Excommunicatio Capiendo.] The ancient form of the *Capias Excommunicat.* was thus:

Rex, &c. vic Suſſex ſalutem ſignificavit nobis venerabilis pater Johannes Ciceſtriæ Ep'us. per literas ſuas patentes quod Jo. de Parochia de H. ſuæ Dioces propter ſuam manifeſtam contumaciam Authoritate ipius Epiſcopi Ordinria Excommunicatus eſt nec ſe vult per cenſuram Eccleſiaſticum, juſticiari quia vero poteſtus regia ſacroſanctæ Eccleſiæ in querelis tuis deeſſe non debeat tibi pre cipimus quod pred. Jo. per corpus ſuum ſecundum conſuetudinem Angliæ juſtities donec ſanctæ Eccleſiæ tum de contemptu quam de injuria ei illata ab eo fuerit ſatisfactum Teſte, &c.

(*b*) 8 Rep. Trollop's Caſe. (*i*) 1 Roll. Rep. 136. (*k*) Moor 467. (*l*) Moor 775. (*m*) 2 Cro. 82.

By

By this Writ it was in a manner left to the diſcretion of the Sheriff, whether he ſhould execute it or not, becauſe it was not returnable in any Court which might enforce the Execution, or puniſh the Officer for a falſe Return.

Therefore *Anno* 5 *Eliz. cap.* 23. it was enacted, that every Writ *de Excommunicato capiendo* ſhall be awarded out of Chancery in Term time (*n*), and made returnable in the Queen's Bench the next Term after the *Teſte*, there being always to be 20 days between the *Teſte* and Return.

That after 'tis ſealed it muſt be recorded in *B. R.* for otherwiſe the party may be diſcharged without pleading it (*o*), then it muſt be delivered to the Sheriff to execute, which if he neglect to do, the Judge of that Court may amerce him, and eſtreat it into the Exchequer.

But if the Defendant lives in *Wales* or in a *County Palatine* or *Cinque Port*, then this Writ muſt be ſent by *Mittimus* out of the Chancery to the chief Officer of that place to proceed and take him.

The Sheriff is bound to return this Writ, and if he makes a falſe Return, he forfeits 40 *l.* to the Party grieved, if he return *non eſt inventus* then a *Capias* iſſues out of *B. R.* returnable in Term time, and there muſt be at leaſt two Months between the Teſte and return thereof, and a Proclamation muſt be made either at the County Court, Aſſize, or Seſſions, ten days at leaſt before the return Day; that the Defendant ſhould within ſix days after ſuch Proclamation render himſelf in Cuſtody in *pain of* 10 *l.* and the Sheriff is to make a Return of this *Capias*.

If upon ſuch return it appears the Defendant hath not rendered his Body, there ſhall iſſue another *Capias* out of *B. R.* with Proclamation as aforeſaid, and if upon the return thereof, the Defendant doth not come in, the Penalty is 20 *l.* and ſo a *Pluries Capias* with Proclamation, *&c.* and like Penalty of 20 *l.* and ſo infinitely with the ſame Penalty until he render himſelf to Priſon.

All this is required by that Statute, and likewiſe that the Excommunicated Perſon hath an addition in the Writ of his Quality, and place of aboard, but if 'tis with a *nuper* of ſuch a place, then the firſt *Capias* with Proclamation ſhall be, that the *Significavit* ſhall contain, without a Penalty, that the Defendant was Excommunicated for ſome of theſe Cauſes following, *(viz.)*

(*n*) 2 Cro. 368. Cro. Car. 582. (*o*) 2 Vent. 338.

(1.) For Hereſie.
(2.) Refuſing to have his Child Baptized (*p*).
(3.) To receive the Sacrament.
(4.) To come to Divine Service.
(5.) For error in matters of Religion or Doctrine.
(6.) For Incontinency.
(7.) Uſury.
(8.) Simony.
(9.) Perjury in the Eccleſiaſtical Court.
(10.) And Idolatry.

If none of theſe Cauſes is contained in the *Significavit*, the Defendant ſhall not incur the Penalties before mentioned, neither if he is in Priſon, beyond Sea, an Infant, of *non ſane* Memory, or Covert, or if he is proclaimed in a County where he is not for the moſt part Reſident.

And if a *Capias* with Penalties ſhould iſſue againſt him, when there are none of theſe Cauſes in the *Significavit*, the Court will grant a *Superſedeas* upon a Motion; but if he ſhould be taken, then he cannot be diſcharged without pleading it, I mean from the Penalties; for tho' he doth plead it, he cannot be diſcharged from his * Impriſonment by ſuch Plea.

But the Plaintiff ought to take care in ſuing forth a *Capias* with a Penalty where none of theſe Cauſes are mentioned in the Certificate (*q*), for if he doth, the Defendant may have an Attachment againſt him, becauſe he is oppreſſed thereby and put to Expences in pleading it.

But this Statute doth not take away an *Excommunicato Capiendo* at Common Law, but only enforces a Defendant Excommunicated for one of thoſe Cauſes to render himſelf under pain of theſe Forfeitures; for a Man may be Excommunicated (*r*) for ſeveral other matters beſides thoſe mentioned in the Statute, and 'tis the uſual practiſe ſo to do; but then the Proceſs muſt be without Penalties, and if the Defendant doth not render himſelf into Cuſtody, the Court of Queen's Bench may award ſuch Proceſs *in infinitum*, till he doth or is taken.

Cautione Admittenda.] (4.) The Laws of *England* take particular care of the Liberties of the People, as in all other matters, ſo in this of Excommunication, for if one Excommunicated is in Cuſtody, and offers ſufficient caution to the Biſhop to obey the Commands of the Church, and he refuſes

(*p*) 1 Roll. Rep. 174. * Cro. Car. 196. Jones 226. 2 Jones 89. 3 Mod. 89. Latch. 174. Contra. and 1 Bulſt. 122. (*q*) Latch. 174. (*r*) Sid. 181.

to

to take ſuch Caution, and to certifie it to the Sheriff, that the Defendant may be diſcharged, he may have a Writ (ſ) *de Cautione admittenda* directed to the Biſhop, commanding him to do it.

If the Biſhop ſhould ſtill refuſe after this Writ is ſerved upon him, the Defendant may have another Writ directed to the Sheriff to warn the Biſhop, in Perſon, to take Caution, and if he ſtill refuſeth after ſuch warning, the Sheriff himſelf may diſcharge the Defendant.

But if the Biſhop is apprehenſive that the Defendant will be diſcharged by the Sheriff, then he may ſue forth a Writ directed to him reciting the whole matter, at the end of which Writ there is this Clauſe, (*viz.*) *Tibi præcipimus quod ipſum Jo. a priſona pred. niſi in præſentia tua cautione pignoratica ad minus eidem Ep'o de ſatisfaciend. optulerit nullatenus deliberes abſque mandato noſtro ſeu ipius Epiſcopi in hac parte ſpeciali Teſte, &c.*

This *Cautio pignoratica* is one of thoſe Cautions allowed by the Canoniſt where there are three in all.

(1.). *Juratory*, and that is where the party makes Oath he will obey the Sentence in ſmall Offences, and that he is not able to give any other Security.

(2.) *Fidejuſſory*, and that is by giving Bond with Sureties, but it hath been a queſtion in whoſe name the Bond ought to be taken, whether in the name of the Queen or the Biſhop, 'tis uſually taken in the name of the Biſhop (t), but it was objected that it ought not to be ſo, becauſe, if the Biſhop ſhould die, the Penalty would go to his Executor, therefore it ought to be in the name of the Queen, who is by Law entituled to it.

(3.) *Pignoratica*, and that is by laying down Money or Goods as a Pledge.

But if the Defendant, without any Caution, freely offers to obey the Sentence, and the Biſhop refuſeth to accept it, and to abſolve him, an Action on the Caſe lies againſt him, or he may be indicted for it, and the reaſon is, becauſe the party is damnified whilſt he continues under the Sentence which he is willing to perform, becauſe all that time he is diſabled to Sue, or to have any remedy for an Injury done to him.

Exemption, See *Monks*.

(ſ) F. N. B. fol. 63. (t) 1 Bulſt. 123. 2 Lev. 36. Raim. 225.

First Fruits. See *Annats.*
Farmes. See *Clergy.*

SINCE there are an order of Men ſet a part to attend the Service of God, 'tis neceſſary they ſhould have a ſufficient maintenance to ſubſiſt, and that they might not be diverted from religious Duties in ſeeking a livelihood by ſuch Profits which may ariſe by Bargains and Contracts or any other ſecular Advantages.

Therefore by the Statute 21 *H.* 8. *cap.* 13. Spiritual Perſons are prohibited to Farm any Lands either by themſelves or by any other to their uſe upon pain to forfeit 10*l. per* Month, one Moiety to the King, the other to the Informer, neither ſhall they buy and ſell again for Profit any Cattel, Victuals or Merchandize upon pain to forfeit treble the value to be divided as aforeſaid.

But if they have not ſufficient *Glebe* or *Demeſne* Lands in right of the Church, they may Farm Lands for the maintenance of their Families, and buy Cattel to Stock the ſame.

This Act was made to encreaſe Devotion, and that the Clergy might not employ themſelves in the ordinary affairs of Life, but be intent upon Devotion, by which means they were in all likelihood to be more reſpected by the Laity, and they have been ſo conformable to this Law ſince the Reformation, that we read of no Proſecutions againſt them upon this account.

'Tis true about ſix Years after the making this Statute there was an Action of Debt brought againſt a Vicar for farming Lands *contra formam Statuti, &c.*

The Defendant pleaded *non habuit vel tenuit terras ad firmam contra formam Statuti*, and it was held that he might give in evidence that he took Lands for the maintenance of his Family.

Glebe.

THIS is the Land which the Parſon or Vicar hath in right of the Church, and that there may be a perpetual Memory thereof, 'tis required by the Canon, that the Biſhops procure a *Terrier* * to be taken of ſuch Lands by the view of honeſt Men within every Pariſh of their reſpective Dioceſs, by the appointment of the Biſhop himſelf, whereof the Miniſter is to be one, and this is to be laid up in his Regiſtry.

* Canon 87.

As

As long as the Parſon keeps the *Glebe* in his own hands he pays no Tithes to the Vicar, tho' he is endowed of all the ſmall Tithes in the Pariſh, but it hath been held, that if he Demiſe the Glebe to a Layman, the Tenant muſt pay the ſmall Tithes to the Vicar, and the great Tithes to the Leſſor.

So likewiſe where the Vicar Leaſes his Glebe, the Tenant muſt pay the great Tithes to the Parſon or Impropriator, and the ſmall Tithes to the Vicar; but this muſt be underſtood where the Land was tithable at the Endowment, for if it was appropriated to a Priory before the Vicaridge was endowed, then, tho' the Endowment was *de minutis decimis* of the whole Pariſh, the Vicar ſhall not have the Tithes of the *Glebe* there, tho' he had Leaſed the ſame, becauſe it was not tithable at the time of the Endowment.

'Tis true if Tithes have once been paid out of Glebe Demiſed by a Parſon or an Impropriator, it ought to be ſo as often as 'tis Demiſed, but where ſuch Tithes are demanded, if they were never paid, then either of them may preſcribe, that he and all his Predeceſſors (*u*) have enjoyed the Glebe Land by themſelves, and by their Tenants diſcharged of Tithes to the Vicar, and ſuch a ſuggeſtion ſhall be a ſufficient ground for a Prohibition, and the rather, becauſe ſmall Tithes out of Glebe Land Demiſed by an Impropriator are not payable *de communi jure* to the Vicar, becauſe *Eccleſia non debet decimari Eccleſiæ.*

But if a Parſon, where there is no Vicar (*x*), Leaſes his Glebe 'tis otherwiſe, eſpecially if he reſerve but a ſmall Rent, for in ſuch caſe the Leſſee ſhall pay Tithes of the Glebe to the Parſon himſelf.

Before the Statute 14 *Ed.* 3. *cap.* 17. a Vicar had no manner of Freehold in the Glebe, and therefore he could not have the Writ of *juris utrum* to recover what had been alienated by his Predeceſſor, which Writ is given to the Vicar by that Statute.

It hath been ſaid, that during an Avoidance (*y*) the Feeſimple of the Glebe is not in the Patron but in Abeiance, that is, 'tis only in expectation, and not in any certain Perſon, and this was *Littleton's* Opinion; the reaſon which he gives why it ought to be ſo is, becauſe it ſhould not be ſubject to any Alienation or Diſcontinuance which might be made by the Poſſeſſor ſo as to bar the Succeſſor, for ſince the Parſon hath *curam animarum*, the Law takes care for him that he

(*u*) 2 Lut. 1062. (*x*) Owen 39. 1 Leon. 300. Cro. Eliz. 161. Noy 35
(*y*) 2 Roll. Abr. 319.

ſhould

ſhould not be deſtitute of that Maintenance which ariſes from the Glebe.

'Tis true, the Year-book 8 *H.* 6. 24. is cited to prove it, but *Serjeant Paſton* argued there could not be an Eſtate for Life, unleſs there was alſo a reverſion Expectant upon ſuch Eſtate which muſt be in ſome body, and Sir *William Babington*, who was then Chief Juſtice of the Common Pleas, was of Opinion, that upon an Avoidance the Fee-ſimple doth rightfully belong to the Patron.

Fitzherbert (*z*) ſays, 'tis in the Patron and Ordinary, and long before he wrote it was held, that they might charge it before the Church was full (*a*).

But after induction the Freehold (*b*) is in the Parſon, and tho' he cannot commit Waſte, yet he may dig for Lead Ore, and ſhall not be prohibited.

Neither ſhall he be charged for his Glebe to ſend out either Horſe or Man to the *Militia*, becauſe 'tis a Spiritual Revenue and held *in pura & perpetua Eleomoſyna*.

Laſtly, If a Parſon or (*c*) Vicar ſows his Glebe and then Demiſes it, and doth not Leaſe the Tithes with the Land, or if he ſell the Corn, and the Vendee cuts it, yet he muſt pay the Tithes to the Parſon, *&c.*

So if the Parſon ſhould die before the Corn is cut, his Executor ſhall have it, but if another is inducted, the Executor of the dead Man (*d*) muſt pay the Tithes of the Glebe to him, but 'tis otherwiſe if the Corn was cut in the Life time of the Former incumbent, for in ſuch the Executor pays no Tithes.

But if a Parſon Leaſes his Tithes, reſerving the Glebe, and then Sows it, he ſhall pay Tithes to the Leſſee.

Guardian of the Spiritualties.

THIS is that Perſon or Perſons in whom the Eccleſiaſtical Juriſdiction of any Dioceſs reſides after the death or tranſlation of a Biſhop, or whilſt he is beyond Sea in any publick Employment for the Church or State, and if ſuch Perſon ſhould be an Archbiſhop, then the Dean and Chapter are Guardians, *&c.* if a Biſhop, then the Archbiſhop of the Provence is Guardian of the Spiritualties, and he may commit this Juriſdiction to what Perſons he thinks fit.

But this was denied by my Lord *Coke* in the Caſe of *Grange* and *Denny* (*e*) in which Caſe there was a Dialogue between

(*z*) F. N. B. 49. b. (*a*) Fitz. Abr. tit. Annuity 53. 5 Rep. 31. b. (*b*) Sid. 152. (*c*) 1 Roll. Abr. 655. Plito. 1. (*d*) 2 Bulſt. 184. (*e*) 3 Bulſt. 136. 1 Rol. Rep. 363.

him

him and Juſtice *Dodaridge* concerning this matter, the one affirming, that at Common Law the Dean and Chapter *ſede Vacante* of the Biſhop, are Guardians of the Spiritualties, but that the Archbiſhops have it by way of Compoſition, and he inſinuates that this was an Uſurpation, for in the ſame Page he tells us, that great Lords will encroach on all to get what they can in their own Hands.

Now, the Year Book (*f*) which he there Cites, proves no ſuch thing; for *Thorp* who was the King's Serjeant ſays poſitively, that the Archbiſhopsare Guardians of the Spiritualties, of common Right, and that ſo was the Cuſtom throughout the Realm at that very time, and this was not denied by *Pool*, tho' he was of a contrary opinion as to the Right, for he held that to be in the Dean and Chapter, unleſs where it was in the Archbiſhop by Preſcription or Compoſition, ſo that it muſt be a meer imagination of my Lord *Coke*, and without any ground for ſuch an Opinion, that Archbiſhops are Guardians of the Spiritualties by Compoſition.

'Tis true, there are ſome Deans and Chapters who Claim this Juriſdiction by virtue of ſome ancient Grants from the Kings of *England*, but 'tis a Juriſdiction which always ceaſes upon the Conſecration of a new Biſhop to the vacant See.

But before the new Biſhop is Conſecrated, they have power to accept Preſentations, and to give (*g*) Admiſſions and Inſtitutions to Benefices, within the Dioceſs; and by the Statute 25 *Hen.* 8. *cap.* 21. they may grant Licenſes, Diſpenſations, Faculties and Reſcripts, in caſes of Appeal, as the Archbiſhop might have done if living. And by the Statute 13 *Eliz. cap.* 12. a Miniſter, during the vacancy of the See, may declare his aſſent and conſent, and Subſcribe the Articles of Religion, before the Guardians of the Spiritualties, and they have power to certifie it under their Seal.

Now, if it ſhould happen, that they ſhould refuſe to grant ſuch Diſpenſations, where by Law they may and ought to do it, then upon a Petition to the Lord Chancellor, by the Party grieved, he may iſſue out a Writ, requiring them under a Penalty to grant the ſame; which Writ begins thus,

Anna, &c. *venerabilibus & Egregiis viris dominis Decano & capitulo Eccleſiæ Cathedralis, & Metropolit' Sancti petri, Eboracen ad quos omnis & omnimoda Juriſdictio Spiritual. & Eccleſiaſtica quæ ad Archiep'um Eboracen. plena ſede pertinuit ipſa ſede jam vacante notoriè dignoſcitur pertinere ſalutem*, &c.

(*f*) 37 Edw. 3. *fo.* 23. (*g*) 2 Roll. Abr. 223.

And

And, if notwithſtanding ſuch Writ, they ſtill refuſe without ſhewing any reaſonable Cauſe, then the ſaid Penalty is forfeited to the Queen; and the Lord Chancellor iſſues out another Writ, directed to two Biſhops, or to ſome other Spiritual Perſons as ſhall be thought fit to do what the Guardians of the Spiritualties refuſed.

Hereſie.

THIS is an opinion contrary to the true Doctrine of the Chriſtian Faith, and obſtinately maintained by ſuch who profeſs the name of Chriſt.

Under this Title, I ſhall only ſhew what the Law was formerly, as to the puniſhment of an Heritick, and how it ſtands at this day.

Before the Statute, 2 *Hen.* 4. a Biſhop could not commit any Perſon for Hereſie. The proceedings againſt him were by the cenſures of the Church, in order to Conviction, that is, the (*h*) Archbiſhop might convict him in a Provincial Convocation, and then he was to be delivered to the Sheriff, who, by vertue of the King's Writ *de Hæretico comburendo* was to Burn him.

But it being found troubleſome to Summon a Convocation upon this occaſion, That Statute provided that every Biſhop might, in his Dioceſs, convict an Heretick, and if this was done in the preſence of the Sheriff, (which was uſual in thoſe days) for the Biſhop would ſend for him on purpoſe, then, immediately upon the Conviction, he was delivered to the Sheriff, who Burnt him, without the Writ *de Hæretico comburendo*; but if it happened (as ſometimes it did) that the Sheriff was not preſent at the Conviction, or if the Heretick was ordered to be Burnt in a County, other than where he was Convicted, in ſuch Caſes the Sheriff could not Burn him without the Writ, *&c.*

I do not find, that a Heritick Convicted had any way to ſave himſelf from the Fire, but by abjuring his Opinion, and this was only upon the firſt Conviction; for if he Relapſed, and was Convicted the ſecond time, then he was certainly Burnt.

And this was *William Sawtree*'s Caſe, who *Anno* 2 *Hen.* 4. was condemned by Archbiſhop *Arundel* in a Provincial Council, for a Relapſed Heretick, and a Writ was directed to the Mayor and Sheriffs of *London* to Burn him, and this was

(*h*) Bro. Abr. Tit. *Hereſy.*

By

by the advice of the (*i*) Lords Temporal in Parliament aſſembled, and it was Subſcribed *per ipſum Regem & Conſilium.*

This was the firſt Perſon who was Burnt in *England* for Hereſie, upon a Sentence given in a Council, and by virtue of the Writ *de Hæretico comburendo.* 'Tis Printed in (*k*) *Fitzherbert*, and burning is there called the uſual Puniſhment, which muſt relate to the uſage Beyond-Sea, for it was ſeldom or never uſed here, tho' I admit Burning was the Puniſhment at Common Law for this Crime; but then the proceedings againſt the Offender was in the Temporal Courts upon Indictment, *&c.*

But in the primitive Church, this, or any other capital Puniſhment for Hereſie was Condemned; and we are told that when two Biſhops Proſecuted the Heretick *Priſcillian* to Death, they were ſo far cenſured for the Barbarity of the Act, that many refuſed to hold Communion with them.

The firſt inſtance that we find of Burning was by *Juſtinian* II. in the 8th Century, who Burnt all the *Manichees* in *Armenia.* But *Anno* 1198. about the beginning of the 13th Century, the *Albigenſes* in the South Parts of *France*, Preaching againſt the Corruptions of the Popiſh Clergy, were, for that reaſon reputed Hereticks; and St. *Dominick* came out of *Spain* to convince them of their Errors, but without any effect, and therefore he perſwaded the Magiſtrates to Burn them.

But as yet there was no Law for it, therefore by the 4th *Lateran* Council it was decreed, that Hereticks ſhould be delivered to the Magiſtrates to be Extirpated, which is a very ſoft word for Burning, and if they neglected then they were to be Excommunicated. Princes were alſo depoſed by the Pope, and their Subjects abſolved from their Allegiance, and this was ſo terrible to them, that they rather choſe to deliver up their Subjects to this Death.

In *Wickliffe*'s time (*l*) a Bill paſſed the Houſe of Lords, but it was never ſent to the Commons, that upon a Certificate made by the Biſhop to the Court of Chancery, of the names of ſuch of *Wickliffe*'s Followers who Preached without Licenſe, and drew great Aſſemblies together, that the Chancellor ſhould iſſue out Writs to the Sheriff to apprehend and commit them, there to remain till they juſtifie themſelves according to the Laws of the Church.

But in the next Parliament, the Commons by (*m*) a Bill declared, that they never aſſented to that Act, and therefore deſired that it might be taken as void.

(*i*) 2 Rol. Abr. 226. (*k*) F. N. B. 269. (*l*) Anno 5 R. 2. (*m*) 6 R. 2.

My

My (n) Lord *Coke* tells us, that it was uſual in thoſe days to Engroſs all Acts of Parliament in Parchment, and to tranſmit them under the Great Seal to the reſpective Sheriff of every County, in order to be Proclaimed there; That this Act 5 *R.* 2. tho' it was only an Ordinance of the King and Lords, and not an Act of Parliament for want of the Concurrence of the Commons, was Engroſſed, and ſent to the *Sheriffs* to be Proclaimed; but that the Act 6 *R.* 2, by which that Ordinance was declared to be void, was never Engroſſed, it was then, and ever ſince kept back, as my Lord *Coke* ſays, by the Prelates, and the Ordinance hath been continually Printed in our Statute Books, which muſt be very extraordinary, becauſe no ſucceeding Parliament hath taken notice of this ſuppoſed Act.

But when *R.* 2. was depoſed, then in gratitude to thoſe Clergy who aſſiſted *Hen.* 4. *cap.* 15. in his Uſurpation, he got a Law to be paſſed in both Houſes, to which he willingly gave his aſſent, the purport whereof was, that none ſhould Preach without Licenſe, nor deliver any Doctrine contrary to the determination of the Holy Church, and if any Perſon was ſuſpected of doing to the contrary, then he was to be committed by the Ordinary till he was either convicted, or abjured his Opinion; and if he refuſed or did relapſe after Abjuration, then he was to be delivered to the Civil Magiſtrate to be Burnt, but firſt his Conviction was to be certified into the Chancery, upon which a Writ iſſued out to Burn him.

But *Anno* 25 *Hen.* 8. *cap.* 14. one *Phillips* having complained to the Commons of his intolerable uſage by the Biſhop of *London*, who had committed him only upon ſuſpicion of Hereſie without any manner of Proof, and this Complaint being ſent up to the Lords, and they not regarding it, the Commons ſent up a Bill, which in effect was a Repeal of that Statute 2 *Hen.* 4. ſetting forth, that as yet there was no Declaration what ſhould be Hereſie, but only in theſe general words, *viz. That it was an Opinion contrary to Scripture or Canonical Sanctions*, then they ſhew that the proceedings in this caſe was without Preſentment, therefore it was provided that Hereticks ſhould be proſecuted by Preſentment, and by the accuſation of two Witneſſes, and then, and not before, the Perſon thus accuſed ſhould be Committed, but not without Bail, and if convicted ſhould be Burnt, but not without the Writ *de Hæretico comburendo*; and that none ſhould be Proſecuted upon any Canon Law, for ſpeaking or doing any thing againſt it.

(n) 3 Inſt. 41.

But

But now, by the Act 1 *Edw.* 6. *cap.* 12. both thoſe Statutes are Repealed; and there is a (*a*) Statute Law in force againſt Hereticks, ſo that the Proceedings againſt them muſt be by the Cenſures of the Church only. By the Act 23 *Hen.* 8. *cap.* 9. 'tis provided, That Archbiſhops may Cite for Hereſie in any Dioceſs within their Provinces, the Biſhop of ſuch Dioceſs conſenting, but if he refuſe, then to Proceed againſt the Heretick.

And it was very neceſſary that thoſe Statutes ſhould be Repealed, becauſe, when Biſhops had Power to Commit Men upon Suſpicion of Hereſie, they did exerciſe that Power in a very extraordinary manner, as for Inſtance, An Executor was Excommunicated at the Suit of a Widow, for denying her the Third Part of her Husband's Goods. But in another place (*b*) my Lord *Coke* tells us, it was for not paying a Legacy, and being under this Sentence, the Man declared that he did not fear it, for that he was not Excommunicated before God, becauſe he had as good a Crop of Corn as any of his Neighbours; for theſe words he was Committed by the Archbiſhop *Bourchier* to *Maidſtone* Goal, as one *non immerito de Hæreſi ſuſpectum*, but the Priſoner was Diſcharged upon a *Habeas Corpus*, by the Court of *King's-Bench*; and Sir *John Markham* the Chief Juſtice, declared the Opinion of that Court, that it was not Hereſie againſt the determination of Holy Church, and ſo not within the words or meaning of the Statute.

And this was the true Reaſon why the Parliament *Anno* 1 *Eliz.* enacted, That nothing ſhould be Hereſie but that which had been ſo adjudged by the Canonical Scriptures, and by the firſt four general Councils, or by any other general Council wherein the ſame was declared Hereſie, by the expreſs and plain words of Canonical Scripture, or ſuch which ſhall hereafter be determined to be Hereſie by the Parliament, with the Aſſent of the Clergy in Convocation.

The Offender in this nature, tho' Convicted, incurrs no Forfeiture of his Temporal Eſtate, becauſe the Proceedings againſt him are *pro Salute animæ*.

The Puniſhment by Death was, *Anno* 29 *Car.* 2. *cap.* 9. thought to be too ſevere, and therefore the Writ *de Hæretico comburendo* was taken away, and Hereſie is made Puniſhable by the Queens Eccleſiaſtical Laws, either by Excommunication, Deprivation, Degradation and other Cenſures, but not extending to Death.

(*a*) 3 Inſt. 40. (*b*) 3 Inſt. 42. *Keyſer's* Caſe.

Holidays.

UNDER this Title, I ſhall ſhew the Practice of the Jewiſh Church, the Cuſtom of the Heathens, and the Uſage of the Chriſtians, under the Goſpel Diſpenſation, to obſerve certain Feſtival Days in the Year, and *laſtly*, in what manner they are enjoyned to be obſerved in our Law:

And firſt, as to the Jewiſh Church, 'tis plain they had a Power, and did actually appoint ſuch days to be Obſerved, in order to magnifie the name of the Lord, and to give Thanks unto him, and to rejoyce for his Bleſſings.

Thus the Feaſt of the Dedication, both of the * Temple and the Altar, the Feaſt of the Tabernacles and Trumpets are expreſſly mentioned in the Scripture, and many more are to be found in (*a*) *Sigonius*, but I ſhall inſtance in one more out of the Scripture, *viz.* Fifty Days after the Celebration of the Paſſover the Lord deſcended upon Mount *Sinai*, at the Promulation of the Law, and that day was always Commemorated in a Peculiar manner by the Jews.

(2.) As for the Heathens, who were guided only by the light of Natural Reaſon, they obſerved ſome days in the Year with diſtinguiſhed Solemnities, and theſe were ſuch in which they had received any extraordinary Benefits, and ſome to Commemorate the Renown of their Brave and Heroick Anceſtors.

Thus the Romans had their *dies natales* in great Eſteem, and the Chriſtians in imitation of them, (for certainly they were to be imitated in many good things) did, on certain days, Commemorate the Lives and Deaths of the Apoſtles, Evangeliſts and Saints, and not only ſo, but that by this means they might imitate them in all Godlineſs and Works of Piety.

(3.) This was an ancient Cuſtom in the Chriſtian Church, for the Apoſtles themſelves appointed the Firſt Day of the Week to be Obſerved in a Solemn manner, in Remembrance of the Reſurrection of our Saviour; and ſince, ſuch tranſcendent Mercies were derived to us by his Birth, Crucifixion, Reſurrection and Aſcenſion. We ought not only to acknowledge the ſame every day of our Lives, but in a more peculiar manner upon certain days appointed for that purpoſe, by the Church.

And it was very early that the Feaſt of *Eaſter* was kept, as St. † *Auſtin* tells us, *Ex Authoritate Scripturæ & Univerſæ Ec-*

* 6 Ezra. 16. 1 Mac. 4. 59.
† Epiſt. 19. cap. 14.
(*a*) *De Republica Hebr.* Lib. 3. cap. 16.

cleſiæ,

cleſia, and ſo long alſo as in the 2d Century there was a Contention in the Churches of the *Eaſt* and *Weſt*, concerning the very day on which it ſhould be Celebrated.

So for our *Whitſontide*, as the Jews obſerved that day on which the Lord deſcended on Mount *Sinai*, as before mentioned, which was 50 days after their Paſſover, ſo we Celebrate the Feaſt of *Pentecoſt*, becauſe the Spirit of the ſame God deſcended upon the Apoſtles on that day, being 50 days after our *Eaſter*.

And certainly the Chriſtian Church hath as great a Power to Inſtitute theſe Feſtivals as the Jewiſh Synagogue had, for the Reaſon of ſuch Inſtitution is ſtill the ſame, *viz.* to Praiſe the Lord in a more Peculiar manner for his Mercies, and for thoſe Examples of the Bleſſed Saints and Martyrs, which he hath ſet before us for our Imitation.

I know 'tis objected, that the Jews were directed in this matter, by the immediate appointment of God himſelf, that they might more truly perform the Services due to him; but if the Church appoints nothing which is either againſt the Scripture or Condemned by it, if it doth not make the word of no Effect by Vain and Superſtitious Traditions, as * *Jeroboam* did, by Inſtituting a new Paſchal Feaſt to be obſerved at another time and place than where God hath appointed it, then, tho' no ſuch Divine Direction was given to the Chriſtian Church for the obſervance of ſuch days, yet that Church hath Power to appoint and enjoyn the Obſervance of Feſtival Days, for the Reaſons already mentioned.

And if thoſe, who are ſo peeviſh with our Church, for Inſtituting particular Prayers on ſuch Days, would but conſider how natural 'tis for us in our Civil Concerns to Commemorate thoſe Days in which we were Delivered by any unexpected means from Temporal Evils and Loſſes, or in which we Received any Extraordinary Advantages, or Bleſſings relating to our Fortunes or Promotions here, they would not be ſo angry at our obſerving thoſe Days in a more Solemn manner in which we were delivered from Eternal Death, and made capable of Inheriting Everlaſting Glory.

Therefore, ſince we are more apt to be led by Imitation than Inſtruction, the Church hath thought fit to ſet apart certain days to Commemorate the Births, Holy Lives and Deaths of thoſe Saints and Martyrs who had Suffered for the Chriſtian Religion, and theſe we call Holidays, and as ſuch they are enjoyned to be obſerved, not only by the ancient Canons †

* 1 King. 12, 31. † Canon 13.

but by thoſe of our Church, by which all Perſons are to Celebrate and keep the Lord's-day, and all other Holidays, according to the Rules and Orders of the Church of *England*, preſcribed in that behalf, *viz.* in hearing the word Read and Taught, in publick and in private Prayers, in acknowledging their Sins, *&c.* but there is no Rule given as to abſtinence from bodily Labour.

And by another * Canon, the *Common Prayer* is appointed to be Read on ſuch Days as are to be kept Holy, and the Miniſter is likewiſe enjoyned to declare to the People every Sunday, whether there are any Holidays or Faſting Days in the Week following, and if he neglect ſo to do, and is admoniſhed by the Ordinary, and ſhall neglect a Second time, he ſhall incur the Cenſures of the Law.

The Scripture hath not derermined the number of Holidays, this is left to the Church; therefore, in a Synod held at *Oxon*, *Anno* 1222, Holidays were divided into Three ſorts.

(1.) Into thoſe which were to be obſerved with all manner of Reverence, and ſuch were all Sundays.

(2.) Into thoſe wherein all manner of Servile Works of inferior nature were to be Refrained;

(3.) Into thoſe wherein any buſineſs might be done, after Maſs was performed, and not before.

And that the People might know what days are to be kept Holy, they are particularly mentioned in the Statute 5 *&* 6 *E.* 6. *cap.* 3. and thoſe, and no other are ordered by that Statute to be Obſerved, which are as follow:

All-Saints, *Andrew*, *Annunciation*, *Aſcenſion*. *Barnaby*, *Bartholomew*, *Circumciſion*, *Eaſter Mondy*, *Epiphany Tueſday*, *James*, great and leſs, *Innocents*, *John Baptiſt*, *John Evangeliſt*, *Luke*, *Marke*, *Matthew*, *Matthias*, *Michael*, *Nativity* of Chriſt. St *Paul*'s Converſion, St. *Peter*, *Philip* and *Jacob*, *Purification*, Sundays, *Simon* and *Jude*, St. *Stephen*, St. *Thomas*. *Whitſon Monday* and *Tueſday*.

The Statute beforementioned tells us, that thoſe Days are not to be accounted Holy in their own Nature, but becauſe of Holy Duties to be performed, and that they are not Dedicated to any Saint in particular, but only to God, in remembrance of a Saint, and this may be ſufficient to remove thoſe Superſtitious Opinions which ſome Men have, relating to the Obſervance of them.

This Act was Repealed by an Act 1 *M. cap.* 2. but that was Repealed by another *Anno* 1 *Jac. cap.* 15. and from hence a

* Can. 14. † Can. 64.

Queſtion

Queſtion hath ariſen, whether that Statute 5 & 6 *Ed.* 6. is now in force, becauſe 'tis not revived by *Special Words.*

'Tis a Queſtion which is anſwered by my Lord *Coke*, * (*viz.*) that where a Statute which repeals another is repealed it ſelf, it makes the firſt Act which was repealed ſtill in force.

But admitting the Law ſhould be otherwiſe, yet ſince the *Calendar* prefixed to the Book of *Common Prayer*, mentions all thoſe *Holidays*, and directs that they ſhould be obſerved in the Church of *England*, and ſince that very *Calendar* † is eſtabliſhed by the Act of Uniformity, 'tis therefore part of the Law of the Land, and it was the Opinion of that Parliament in which that Act paſſed, that thoſe who abſent themſelves from their Pariſh Church where Common Prayer and Preaching is uſed on thoſe Days, do ſchiſmatically abſtain from the ſame.

Beſides the Statute 1 *Eliz.* is declared by this Act to be in full Force, and there the *Liturgy* is eſtabliſhed.

Now by the one, every Pariſhioner is enjoined to reſort to his Pariſh Church on *Holidays*, under the penalty of the Cenſures of the Church, and 12 *d.* for every Offence, and by the other there are Collects, Epiſtles, and Goſpels appointed to be read on each Holiday.

'Tis plain, that the Clergy and People are not very ſtrict in obſerving theſe days, and there are no other penal Laws to enforce ſo neceſſary a Duty, but the Miniſters may be compelled to it by their Dioceſans, for they have the ſame Power to oblige them to this Duty as they have to make them obſerve the Sabbath.

'Tis true, there is a proviſo in the Statute of *Ed.* 6. that Labourers and Fiſhermen may (upon occaſion) work on theſe days either in or out of Harveſt, and 'tis certain, that this Liberty is carried farther then at firſt intended, and in a manner to the total prophanation of all Days ſet apart for religious Worſhip.

And tho' ſome Perſons through an immoderate deſire of Profit, and ſome for Pleaſure, have neglected to come to Church on theſe appointed days, yet if the Clergy would conſtantly attend the publick Service, this might in time ſtir up the People by their good Example to the religious obſervance of Holidays.

Laſtly, Thoſe which I have mentioned are the ſtated Holidays of the Church, but there are ſome other days which are to be obſerved by particular Acts of Parliament, as the 5th of

* 2 Inſt. 686. † Car. 2. cap. 4.

November (*a*), which is a day of Thankſgiving for the diſcovery of the Gunpowder Treaſon.

The 29th day of *May* (*b*) as an Anniverſary for reſtoring the Royal Family; both theſe Statutes are appointed to be read in the Church reſpectively on each of the ſaid Days after morning Prayer or Preaching.

So the 30th of *January* is a Day of Humiliation for the murder of *Car.* 1. but this Act is not directed to be read in the Church.

Hoſpitallers.

THERE was an Order of Religious Knights erected about the ſeventeenth year of *Ed.* 2. who lived under particular Rules, and of which the grand Maſter and two Chaplains only were to be Eccleſiaſticks, and theſe were called *Hoſpitallers*, becauſe they built an Hoſpital at *Jeruſalem* to receive Pilgrims.

Theſe Knights ſucceeded the *Templars*, who were ſo called, becauſe they had a Temple at *Jeruſalem* for the purpoſe aforeſaid; but they being ſuppreſſed by a Council held at *Vienna* in the Reign of Pope *Clement* 5th (*c*), their Lands here in *England* were transferred by the Parliament to theſe *Hoſpitallers* (*d*), who are alſo Knights of St. *John of Jeruſalem*, and are now thoſe which we call Knights of St. *John of Malta.*

This Order had large Endowments to ſupport themſelves and entertain Pilgrims, and had alſo many Priviledges granted to them by ſeveral Popes, of which this was one, (*viz.*) that their Lands ſhould be diſcharged from payment of *Tithes.*

There are none of this Order in *England*, for it was diſſolved in the Reign of *H.* 8. of which I ſhall give a particular account.

Several Abbots ſurrendered their Monaſteries to that King in the 29th year of his Reign, and two Years afterwards an Act paſſed (*e*) to confirm thoſe Surrenders, in which there was a ſpecial Clauſe, that the King and his Patentees ſhould hold thoſe Lands diſcharged of Tithes in the ſame manner as the Abbots held them at the time of the Diſſolution, and this Act extended to all *Monaſteries* which ſhould *afterwards be ſurrendered* to the King.

(*a*) Jac. cap 1. (*b*) 12 Car. 2. cap. 14. (*c*) Anno 1312. (*d*) Anno 1323. 17 Ed. 2. (*e*) 31 H. 8. cap. 13.

The

The Hoſpitallers were not then diſſolved nor until the year afterwards, (*viz.*) by an Act made 32 *H.* 8. *cap.* 24. by which their Lands and all the *Priviledges* they had therein were given to the Crown; but in the Act there is no particular Clauſe to exempt them from payment of Tithes, ſo that the Lands being *granted* (*f*) to the King and not *ſurrendered*, they are not comprehended within the Letter or meaning of the Act 31 *H.* 8. and therefore ſhall pay *Tithes*.

But my Lord *Dyer* (*g*) tells us, that *Anno* 10 *Eliz.* upon conſideration of this Statute Judgment was given to the contrary, and *Anno* 4 *Car.* the like Queſtion came in debate again, and it was held, that the (*h*) Exemption which the *Hoſpitallers* had from payment of Tithes was a *Priviledge*, and tho', 'tis true, that all *Priviledges* are perſonal, and that when the Perſon or Corporation to which they are annexed is either (*i*) dead or diſſolved, that the Priviledge is likewiſe gone, yet when 'tis given or transferred to another by Act of Parliament before the Diſſolution of the Corporation it ſelf, they ſhall enjoy it.

That this *Priviledge* was given to the King by the Statute 32 *H.* 8. and therefore not only he but his *Patentee* ſhould hold them diſcharged of Tithes, becauſe 'tis not a perſonal *Privilege* in the King alone to whom it was transferred, but a real diſcharge of the Land it ſelf from payment of Tithes, which accompanies it in whoſoever hands it ſhall fall.

Incontinency. See *Adultery.*

Indicavit.

BY the Common Law, if the Incumbent preſented by one Patron libelled for Tithes againſt the Incumbent of another Patron, the Writ of *Indicavit* did lie, which is in the nature of a Prohibition, and iſſueth out of the Queen's Courts at *Weſtminſter*, 'tis to be brought by the Patron of the Defendant in the Spiritual Court, and 'tis to be directed either to the Party himſelf, or to the Eccleſiaſtical Judge where the Cauſe is depending, and 'tis to prevent a recovery in that Court till the right is determined at Common Law.

After this Writ was ſerved, all Proceedings in the Spiritual Court were ſtaied; but then the Patron might have a Writ of right *de advocatione decimarum* by vertue of the Statute of *W.* 2.

(*f*) Moor 913. (*g*) Dyer 277. b. (*h*) Jones 182. Latch. 89. Bridgman 32. (*i*) 2 Brownl. 8. 30.

cap. 5. but not unleſs he claimed the Advowſon in Fee, for if he was Tenant in Tail, or for Life, he could not maintain a Writ of Right, but in ſuch caſe he was to appear upon an Attachment and receive a Declaration, and then plead his Title, and ſo to proceed as in other Prohibitions, and when Judgment was given at Law, the Cauſe was remitted to the Eccleſiaſtical Court, and determined there according as it was at Law.

And it was not material at the time of the making that Act (*k*) of what value the Tithes were, but by the Statute *Articuli Cleri* (*l*) they muſt amount to the fourth part of the value of the Church, otherwiſe an *Indicavit* will not lie if brought by a common Perſon, neither will it lie if brought before the Libel or after the Sentence in the Spiritual Court.

Nor is it neceſſary that the value of the Tithes ſhould be ſet forth in the *Indicavit*, for if they do not amount to the fourth part, that muſt be ſhewed on the other ſide for a Conſultation.

But all theſe proceedings being now obſolete, I ſhall not enlarge any more upon this Writ.

Induction.

THIS may be compared to *Livery and Seiſin* of a Freehold, for 'tis putting the Miniſter in actual poſſeſſion of the Church, and of the Glebe Lands which are the temporalties thereof.

It may be made by a Biſhop, or by a Dean and Chapter, as particularly by the Dean and Chapter of *Pauls* and of *Litchfeild*, it may be done by the Patron himſelf, but not as Patron, but by ſome other Authority, as if a Biſhop is Patron of a Living within his Dioceſs, in which caſes it muſt be either by Preſcription or Compoſition; thus the Lord *Viſcount Mountague* doth induct the *Dean of Battel in Suſſex* into that exempt Deanry.

But the uſual method is by vertue of a Mandate under the Seal of the Biſhop to the Archdeacon of the place, who ſeldom inducts any Clerk in Perſon, but iſſues out his Warrant to all Clergymen within his Archdeaconry, requiring them or any of them to do it, then one of the Clergy taking the Perſon to be inducted by the hand, lays it on the Key of the Church, in the Door, and pronounces theſe words:

(*k*) 2 Inſt. 364. (*l*) Cap. 2.

By

By vertue of this Warrant, I induct you into the real and actual poſſeſſion of the Rectory of H. *with all its Profits and Apurtenances.*

Then he opens the Door of the Church and puts the Perſon into poſſeſſion thereof, who uſually tolls a Bell, which is to give the Pariſhioners notice that ſomething is doing in the Church.

This Ceremony being over the Perſon thus inducted, is then compleat Incumbent and entituled *ad Beneficium*, that is, to an Eſtate in the Glebe and Tithes.

Then the Inductor is to certifie the Induction, which he endorſes on the Archdeacon's Warrant, and all who are preſent uſually ſet their hands to it as Witneſſes.

But if the Key of the Church cannot be had, the Clerk to be inducted may lay his hand on the Ring of the Door, or on the Church-wall, or on the Fences in the Church-yard, and either of theſe is ſufficient.

Theſe Ceremonies are only to make the Induction publick as it ought to be, that the whole Pariſh may take notice of it.

The Perſon thus inducted, muſt within (*m*) two Months afterwards read the 39 Articles, and declare his unfeigned Aſſent and Conſent to them after the Common Prayer is begun and before 'tis ended.

And likewiſe within the ſaid two (*n*) Months, he muſt, upon ſome Sunday, read the whole Service for that day out of the Book of Common Prayer, and declare his Aſſent to it in that very Church to which he was inducted, which he muſt do in theſe words.

I P. S. *do declare my unfeigned Aſſent and Conſent to all and every thing contained and preſcribed in and by the Book intituled, the Book of Common Prayer, and Adminiſtration of Sacraments, and other Rites and Ceremonies of the Church according to the uſe of the Church of* England, *together with the Pſalter or Pſalms of* David *pointed as they are to be ſung or ſaid in Churches, and the form or manner of making, ordering, and conſecrating Biſhops, Prieſts and Deacons.*

The Perſon neglecting any of theſe things, the Church thereby becomes void, and this he muſt do *toties quoties* he accepts any other living.

Induction is a temporal Act, and therefore if the Archdeacon ſhould either refuſe to induct a Parſon, (*o*) or to ſend his Warrant for that purpoſe, an Action on the Caſe lies againſt

(*m*) 13 Eliz. cap. 12. (*n*) 14 Car. 2. cap. 4. (*o*) 1 Bulſt. 179. 2 Bulſt. 265. Hob. 15. 2 Roll. Abr. 893. Plito. 10. Moor 879.

him,

him, in which the Plaintiff ſhall recover Damages, but cannot by a Verdict be inveſted in the Glebe or Tithes, he may likewiſe be proſecuted in the Eccleſiaſtical Court, and there he will be compelled by a Sentence to induct the Clerk.

After he is inducted to the Church (*p*), his Inſtitution ſhall not be queſtioned in the Spiritual Court, becauſe the Church is then full, and if the Inſtitution is inſufficient, that may be ſhewn upon the Trial of the Induction in the Temporal Court, which will certainly be wrong if the Inſtitution upon which 'tis founded is ſo; neither hath any one a right to the Tithes which ariſed during the vacancy, beſides the new inducted Incumbent, for he hath then *jus ad rem*.

But if the Authority of the Perſon who made the Mandate ſhould be determined * either by Death or removal before the Clerk is Inducted, then his Induction afterwards would be void; as if the Archbiſhop during the vacancy of any See admits and inſtitutes a Clerk, and then makes a Mandate to the Archdeacon to Induct him, and before 'tis executed a new Biſhop is Conſecrated, the Induction afterwards made by vertue of that Mandate is void, becauſe the Archdeacon derived his Authority from the Archbiſhop, and ſuch an Executory Power ceaſed upon the Conſecration of the new Biſhop.

But this Judgment was reverſed in the Exchequer-Chamber, † becauſe the Archbiſhop hath a Sovereign Authority throughout his whole Provence, and therefore when he doth any thing which a Provincial Biſhop ought to do, ſuch Act is not void but voidable.

Beſides his Mandate to the Archdeacon, is to one who hath Authority to induct *virtute Officii*, and the Mandate it ſelf is only to intimate that the Perſon is inſtituted, and to oblige the Archdeacon to Induct him under the penalty of Eccleſiaſtical Cenſures, the induction is only Miniſterial, 'tis the Inſtitution which is the Judicial Act, and which the Archbiſhop had an undoubted Power to Grant, for he is Guardian of the Spiritualties during the vacancy, and the Law is clear that an Authority well commenced ſhall be perfected by the ſame Perſon.

Inſtitution.

WHEN the Ordinary hath admitted any Clerk to a Benefice, he either grants him Inſtitution under his

(*p*) 2 Roll. Abr. 282. Plito. 3. 294. Plito. 12, 13. * 1 Vent. 309. 2 Lev. 199. † Jones 78.

Epiſcopal

Epiſcopal Seal, or ſends him to his Vicar-general, Chancellour, or Commiſſary to do it, which is uſually in this Form.

Inſtituto te Rectorem Eccleſiæ de H. *& habere curam Animarum Parochianorum, &c. & accipe curam tuam & meam.*

And this may be done by the Biſhop under the Epiſcopal Seal, or any other Seal beſides that of his Office, and tho' he is not in his Dioceſs, for 'tis the Act of Court which makes the Inſtitution, and the Inſtrument under Seal is only a Teſtimonial of what was done there, to which Inſtrument ſome Witneſſes ſhould ſubſcribe their names.

If Inſtitution is granted by the Vicar General or by any other Subſtitute, their Acts are taken in Law to be Acts of the Biſhop of himſelf, and he muſt anſwer for any irregularities committed by them.

But the Biſhop is prohibited by the Conon (*q*), to inſtitute a Clerk who hath been Ordained by any other Biſhop without ſhewing his Letters of Orders.

By an Inſtitution the Clerk hath only (*r*) *jus ad rem*, and therefore he can do no Act to charge the Glebe, tho' confirmed by the Patron and Ordinary till he is actually inducted into the Living, for then, and not before, he hath a Freehold in the Glebe.

But at Common Law an Inſtitution (*ſ*) even upon a wrongful Preſentation gave the Incumbent ſuch a right, that if he had been poſſeſſed of the Living by the ſpace of 6 Months, this was a Plenarty, and he could not be removed, becauſe he came in by a Judicial Act of the Biſhop who is intruſted by the Law to take care in this matter, and ſince by the Writ of *Quare Impedit* it ſelf, it appears that the Law requires *idoneam perſonam* to be incumbent in every Pariſh, when the Biſhop (*t*) hath admitted one to be Able, that implies he is *perſona idonea*, and then the Law hath its final Intention, that is, the Church is then ſufficiently provided with a Clerk, and 'tis *plena & conſulta*, which puts the rightful Patron out of Poſſeſſion, but he is not without Remedy, for he might have a Writ of right of Advowſon, and recover that of which he was diveſted by this Uſurpation.

The Books are plain, that upon an Inſtitution the Church is full againſt a common Perſon, and likewiſe againſt the Queen, if ſhe hath no Title but what ſhe derives from a Subject, becauſe the Incumbent hath then a Freehold, which is begun, tho' not compleated till Induction.

(*q*) Can. 39. (*r*) Plo. Com. 528. (*ſ*) 2 Inſt. 356. (*t*) 2 Roll. Abr. 349, 294, 312. 1 Roll. Rep. 191, 227. 4 Rep. 72.

And

And if the Archbiſhop ſhould inhibit the Archdeacon to induct the Clerk thus Inſtituted, he may do it notwithſtanding ſuch Inhibition, and the Induction ſhall be good.

And to give an inſtance that the Church is full upon an Inſtitution, I will put this caſe, (*viz.*) If the Grantee of the next Avoidance preſents and his Clerk is admitted and inſtituted, and ſhould die before he is inducted, he ſhall not preſent again, for his grant was ſatisfied by the inſtitution of his Clerk, which proves that the Church was then full.

But a bare Inſtitution without Induction doth not make a Plenarty againſt the Queen where ſhe hath a Title to preſent in her own Right (*u*), or by vertue of her Prerogative, and therefore if her Preſentee ſhould die before Induction, ſhe may preſent again, becauſe ſhe had not the full and complete effect of her Preſentation.

Now, tho' it doth not make a Plenarty againſt the Queen, (*x*) yet if the Perſon thus Inſtituted and not Inducted doth take a ſecond Benefice, it ſhall make the firſt void, becauſe by the very Inſtitution he had *accepted* the Living, and the words of the Statute are, (*viz.*) (*y*) *if a Parſon having one Benefice with cure accepts another*, &c.

And if in ſuch caſe there ſhould be a Diſpenſation (*z*) to hold both the Livings, it will not ſerve, for coming after Inſtitution 'tis too late, becauſe the Church is full by it, and both the Patron and Ordinary had executed their Authority, and can never revoke it, the Inſtitution being matter of Subſtance, and the Induction which is to follow is no more then a Ceremony, to give the People notice of the Poſſeſſion.

Beſides, by this very Act of the Biſhop * the cure of Souls is transferred from him to the Clerk, tho' it doth not always follow, that an Inſtitution to a Benefice ſhould imply that the Clerk hath *curam animarum*, becauſe the Queen hath ſeveral *Donatives* in *Wales*, † which are not properly Benefices with cure of Souls, but yet the Incumbents on ſuch Donatives come in by Preſentation and Inſtitution.

If the Biſhop refuſeth to grant Inſtitution, no Action (*a*) of the Caſe lies againſt him, the Party may have a remedy in the Court of Audience by a *Duplex Querela*, *&c.*

Laſtly, Inſtitution it ſelf is properly cognizable in the Eccleſiaſtical Court, but if after (*b*) *Induction* a Man is ſued there, ſuppoſing his Inſtitution was void, that ſhall be tried in the Courts at Law, becauſe, by the Induction the Perſon had a Freehold in the Benefice, which muſt be tried at Common Law.

(*u*) 2 Inſt. 356. 9 Rep. 132. (*x*) Dyer 360. 4 Rep. 39. (*y*) 21 H. 8. (*z*) 4 Rep. 79. Moor 443. 448. * 1 Mod. 12. † Sid. 447. (*a*) 1 Roll. Rep. 64. (*b*) 2 Roll. Abr. 282. 294.

Jus

Jus Patronatus.

WHERE two Perſons preſent two Clerks to the ſame Church, by different Titles, the Church is become Litigious, becauſe the Biſhop doth not know who is the Right Patron, and by conſequence cannot tell which Clerk to admit.

So 'tis if two Patrons preſent one Clerk, becauſe the Biſhop cannot admit ſuch Preſentee generally, but muſt admit him as the Clerk of one.

But if two Coheireſſes preſent ſeveral Clerks by the ſame Title, that is, where an Advowſon deſcends to them, and they cannot agree to Preſent one and the ſame Clerk, ſo that they Preſent ſeverally, and this is found by a Verdict in a *Jus Patronatus*, the Biſhop is bound to admit the Clerk of the Eldeſt, for the (*u*) Church in ſuch Caſe is not Litigious, nor if Tenants in Common Preſent ſeveral Clerks, for the Biſhop may admit the Clerk of either, but if they do not agree in their Preſentation within Six Months after the Avoidance, the Biſhop may Collate.

So if one Preſent, and the Biſhop doubts his Title, (as in ſome Caſes he may) then he may require to be ſatisfied in a Legal Method; as for Inſtance, if a Parſon is deprived, notice muſt be given to the Patron, otherwiſe no Lapſe Incurs, and if upon ſuch Deprivation the Biſhop ſhould Collate and Die, how ſhall his Succeſſor know, that notice was give to the True Patron?

And therefore the Law hath provided a Security for him, and that the Cure may not long be neglected, and this is by a *Jus Patronatus*, which may be brought at the Inſtance of one or both Parties, that is, either by Patron or Clerk, but the Biſhop is not bound to award it *ex officio*, but may ſuffer the Church to Lapſe, yet when he is required to do it, and refuſeth, he is a Diſturber, and in ſuch Caſe the Church ſhall not Lapſe, nor after a Verdict found upon a *Jus Patronatus*, becauſe the Biſhop ought to Preſent that Patron's Clerk for whom it was found.

The Proceedings upon it are as follow:

The Biſhop Iſſues forth a Commiſſion under his Epiſcopal Seal, directed to his Chancellor, or to ſome other Civilian, and ſometimes to Common Lawyers, to enquire who hath the Right to Preſent to ſuch a Benefice.

(*u*) 21 Hen. 6. 48. 6.

Theſe

These Commissioners have Authority to Summon a Jury, which is done by a *Mandate* under their Hands, *&c.* directed to some Officer for that purpose, half of which Jury must be Clerks, and the other half Laymen, but there is no necessity that six of each should be the compleat number, for they may cause more than twelve to be Summoned and Sworn, so that they Swear no more Laymen then Clergymen.

But Twelve is a Full Jury, and if they do not Appear, the Clergymen may be punished by Sequestration, and the Laymen by Excommunication.

If they Appear, the Commissioners are in the first place to Swear a Clerk, and then a Layman, till the whole number are Sworn.

The Points which they are to inquire into are,

(1.) Whether the Church is void.
(2.) Who presented last.
(3.) Who is the Rightful Patron to the void Church.
(4.) Who ought to present to the same.

These Articles are to be publickly Read and delivered to them; but 'tis requisite that the Jury should find for that a Patron who presented last, for if he is the true Patron it will appear so upon the Trial of a *Quare Impedit*, if he is not, then he Presented by Usurpation, and if his Clerk was Inducted, and the Church was full of him for Six Months, the Patron who had the Right must Recover it in a Writ of Right of Advowson, before he shall Present again.

After the Jury are Sworn, then Council is to be heard on both sides, as at all other Trials, *&c.* to maintain the respective Titles of the Patrons.

Then the Jury give in their Verdict, and 'tis necessary this should be done at that very time, tho' the Commissioners may give them longer time to consider of the Evidence, but if they will not agree, or refuse to give a Verdict, or be equally divided, or find a Special Verdict, the Bishop may Discharge them, and cause another Jury to be Sworn.

As to the awarding a *Jus Patronatus*, 'tis not a thing of Necessity, 'tis no more than an Inquest of Office, and for the Bishop's Security, that he may not be a Disturber, for he may at his Peril take notice which (*x*) Patron hath the Right, and admit his Clerk accordingly, and this he may do even after a Verdict in a *Jus Patronatus*, but if in a *Quare Impedit* brought against him, *&c.* the Title is found for the Plaintiff, this will make the Bishop a Disturber, for it seems to be Injustice, and

(*x*) 1 Leon 168.

against

againſt the true intention of the Law to admit a Clerk whoſe Patrons Title was not found by the Jury, but againſt him.

Therefore a Verdict in this Caſe being only for the ſafety of the Biſhop, and ſince it puts the Patron upon ſome Charge to ſatisfie him in the Right, he ought to receive the Clerk according to the Verdict; and it was my (y) Lord *Hobert's* Opinion, that if he doth otherwiſe, an Action on the Caſe lies againſt him, in which Action the Patron may Recover Damages for the Expences and delay occaſioned by this means; but ſuch Action will not lie till he hath recovered his Title in a *Quare Impedit* brought againſt the other pretending Patron and his Clerk, but not againſt the Biſhop, for if he is named in that Action, no other will lie againſt him.

As the Church may become Litigious by a double Preſentation, it may likewiſe be ſo by a double *Jus Patronatus*, for the Biſhop may award two Commiſſions of enquiry, at the inſtance of each of the Patrons, (tho' 'tis not uſually done) and if in ſuch Caſe the Juries find diſtinct Titles in each Patron, the Biſhop can have no Direction by ſuch Verdicts, but may refuſe each Clerk, and ſuffer the Church to Lapſe.

So if a Verdict is given for one of the Patrons, and if before he Preſents his Clerk again to the Biſhop, as he ought to do, another pretending a Title ſhould Preſent his Clerk, the Biſhop may award a new *Jus Patronatus* to determine the Right between the new and old Patron.

But tho' the Clerk, for whoſe Patron the Verdict is found and ſo Certified by the Commiſſioners to the Biſhop, ought to be Preſented again to him for Admiſſion, it may be upon the former Preſentation, and not a new one, and if he is negligent in this matter for Six Months, the Church is Lapſed.

Upon the whole Matter, a Verdict in a *Jus Patronatus* is a good Warrant for the Biſhop to admit the Clerk of that Patron for whom 'tis found, and it doth not bind the Right of the other Patron, for he may recover it in a *Quare Impedit* notwithſtanding ſuch Verdict; and if he doth, the Biſhop is not a Diſturber, tho' he hath admitted the Clerk of the other, becauſe the Verdict is his Security, and 'tis likewiſe ſome Evidence for that Clerk, that his Title was found to be the beſt.

(y) Hob. 318.

King

King.

THE Queen is Patron Paramount of all the Benefices of *England*; therefore, if other Perſons who are intruſted by the Law do neglect their Duty in filling the Churches, then by the natural Order and courſe of Government the Right devolves on Her, who being Veſted with the Supreme Power is to ſupply the Defects of others, and this is done by Preſenting fit Perſons to void Churches.

Under this Title I ſhall Treat,

(1.) Of the King's Right to Preſent upon Lapſe, and in what time it muſt be done.

(2.) Whether there can be an Uſurpation on his Right to Preſent; and whether he can Preſent by Uſurpation.

(3.) Where he ſhall have a Writ to the Biſhop.

(4.) Where his Incumbent ſhall be Outed.

(5.) Of his right to Preſent whilſt the Temporalities are in his Hands.

(6.) Of his Right to Preſent upon an avoidance by Ceſſion.

(7.) Where his Preſentation ſhall be void, and where it ſhall be Revoked.

(8.) In what Caſes his Lands are priviledged from payment of Tythes.

Of his Right to Preſent by Laps.

By the Statute 17 *Edw.* 2. *cap.* 8. 'tis Enacted, That if a Stranger Preſents to a Church which is in the Gift of the King, and he ſhould recover his Right in a Trial at Law, tho' after 'tis Lapſed to the Biſhop, that ſhall not prejudice his Title, ſo as he Preſents within Six Months after ſuch recovery, from which it may be inferred that if the King had not Preſented within that time his Church ſhould Lapſe.

My (*a*) Lord *Coke* tells us, That in the Reign of his Son and Succeſſor, the Clergy pretended that Lapſe ſhould incur againſt the King, which occaſioned that King to Publiſh this Reſolution.

Quod ab exordio naſcente Eccleſia in Anglia Reges ad omnia Eccleſiaſtica Beneficia **qualitercunq;** *vacantia & ad eorum collationem ſpectantia quandocunq; placeret eis jure Regio preſentarunt.*

Now, the (*b*) words *qualitercunq; vacantia* ſeem to comprehend as well ſuch Benefices to which he had a Right to Preſent *Jure Prærogativa* as by Lapſe, *&c.* as thoſe which he had

(a) 2 Inſt. 360. (b) 2 Inſt. 360.

plene

pleno jure, and the Regiſter tells us in ſuch Caſes *nullum tempus occurrit Regi ex conſuetudine hactenus obtenta in Anglia.*

But the Law is otherwiſe, for if the King hath a Right to Preſent by Lapſe, and ſuffers either the true Patron to Preſent, or any other by Uſurpation, and his Clerk ſhould be inducted and Die, the Patron and not the King ſhall Preſent, for where the Law appoints a certain time both for the commencement and determination of the King's Title, if he ſuffer that time to expire he hath loſt his Turn, as for inſtance, in this very Caſe the King's Title began upon the neglect of the Archbiſhop, to Preſent within his (*c*) Six Months; now, if he will ſuffer another to Preſent, and the Clerk thus Preſented doth afterwards die Incumbent, then his intereſt is determined, for the Rule *nullum tempus occurrit Regi* will not hold in ſuch Caſes, ſince the King is to have but one Turn, and that muſt be the next.

'Tis true, where he hath the Advowſon in Fee, there he ſhall not be diveſted of his (*d*) Right, even upon a double Uſurpation and Plenarty, for it continues ſtill in him, and the Preſentation by a Subject is but matter *in fait*, which, tho' coupled with Inſtitution, which is a Judicial Act of the Biſhop, yet it ſhall not prejudice the King, becauſe 'tis grounded on a Wrong, yet ſuch Uſurpation will bind him *quoad*, the Poſſeſſion, but the Incumbent may be removed by a *Quare Impedit*, without putting the King (who is the true Patron) to his Writ of Right.

I grant it was otherwiſe adjudged in the (*e*) Common Pleas, between the King and *Campion*, againſt the Opinion of the (*f*) Chief Juſtice *Anderſon*, but that Judgment was afterwards Reverſed in *B. R.*

'Tis made a Quere in (*g*) *Dyer*, if the Queen had a Title to Preſent by Lapſe, and afterwards the Biſhop grants Inſtitution to the Clerk of the True Patron, whether that ſhall bind Her Title or not, my (*h*) Lord *Hobert* was of Opinion that it did, becauſe the Patrons Right always continued till the Queens Title by Lapſe ſhould be Executed, and if he Preſents to the Biſhop, before the Queen Preſents Her Clerk, he is bound to admit his Preſentee.

But the latter Authorities are otherwiſe, for the (*i*) Title by Lapſe is ſo veſted in the Queen, that She may at any time remove the Incumbent by a *Quare Impedit*, but if he ſhould Die Incumbent then She hath loſt Her Turn.

(*c*) Hutt. 24. (*d*) Yel. 90. Brownl. 166. (*e*) 2 Cro. 53. (*f*) 2 Cro. 23. (*g*) Dyer 277. 4. (*h*) Hob. 157. (*i*) Het. 125. 2 Rol. Abr. 351. Litt. 25. 2 Lut. 1086.

And ſo it is if the Incumbent ſhould be deprived without any (k) Covin, as it was adjudged in a Caſe between the Queen and the Biſhop of *Norwich*; 'tis true, in the very next Year, *viz.* *Anno* 32 *Eliz.* it was adjudged otherwiſe, that is, if the Incumbent be deprived it ſhould not Bar the Queen of Her Turn to Preſent by Lapſe, becauſe it was the Act of the Party, which was the cauſe of his Deprivation, but the true reaſon is given by (l) *Gouldsborough*, *viz.* That the ſame Perſon who was deprived was Preſented again, and becauſe that lookt like Colluſion it might induce the Court to give Judgment for the Queen.

Serjeant *Moor*, who Reports the ſame Caſe tells us, That (m) Colluſion ſhall not be intended, becauſe the deprivation was a Judicial Act, and therefore the Court at firſt inclined againſt the Queens Title, but afterwards gave Judgment for Her.

The other Reporters do not mention that the Perſon deprived was Preſented again, but another, and yet the Queen had Judgment.

Juſtice *Crooke* ſays, it would be inconvenient that the Queen ſhould looſe Her Preſentation by the Act of the Incumbent, which occaſioned his Deprivation.

Juſtice *Owen* and *Leonard* tells us, That the deprivation might be by Colluſion, and Serjeant *Moor* ſays it might not, but that Colluſion ought to be averred, and ſhould never be intended, however, they all agreed that Judgment was given for the Queen, but it muſt neceſſarily be upon a ſuppoſed Colluſion, for it was adjudged contrary before, even in the Caſe of Deprivation, and ſo it was in the Caſe of Reſignation, which is the Voluntary Act of the Party, as well as Deprivation, which is occaſioned likewiſe by his own Act, and yet in ſuch Caſe it was held that if the (n) Party Reſigns before the King hath Preſented upon a Lapſe his turn is loſt, for he hath it by vertue of his Prerogative, *pro unica vice tantum*.

And 'tis for this Reaſon that if the King hath Preſented by (o) Lapſe, and his Clerk is Inducted, and afterwards looſeth his Incumbency by ill Pleading. In an Action brought againſt him to try the Right, he ſhall not Preſent again, becauſe he had but one Turn, and that was executed.

'Tis agreed that the King hath a Title to Preſent by Lapſe, but it hath been a Queſtion if he ſhould Die before he Preſents, whether his Succeſſor ſhall be Entituled to it? or whether he

(k) 4 Leon. 217. (l) *Gouldſ.* 79, 83, 86. (m) Cro. Eliz. 119. Owen 5. Moor 259. 4 Leon. 95. (n) 2 Cro. 216. 1 Brownl. 161. (o) 1 Leon. 194.

is not barred by the Statute 25 *Edw.* 3. *cap.* 1. by which 'tis Enacted, That *neither the King or his Heirs ſhall Preſent to any Benefice* **in the Right of another,** *which happened in the time of his Progenitors, ſaving to him and his Heirs all Preſentments in anothers Right, fallen or to fall in his time, or in time to come.*

Some of the Judges were of Opinion, that there was no ſuch exception in the (*p*) Act, but moſt of them were ſatisfied to the contrary, and all agreed, that tho' he Preſents by virtue of his Prerogative, yet 'tis in the Right of the Patron.

Laſtly, If a Clerk neglects to Read the 39 Articles, and continues in Poſſeſſion during his Life, the (*q*) Church by this means would have been void, but then notice muſt be given to the Patron, which was not done. The King Preſents on a ſuppoſed Title by Lapſe, but ſuch Preſentation is void, becauſe as to the Patron the Church is full, till he had notice of the avoidance.

Whether there can be an Uſurpation on the King, &c.

Next I ſhall conſider whether there can be any Uſurpation upon the King, ſo as to bar his Right, and whether he can Preſent by Uſurpation.

And as to this matter it was formerly held, that if there were an Uſurpation upon his Right, he might Preſent after the Death of the Incumbent, without recovering that Right in a Writ of Advowſon, but he could not Preſent the Clerk of the Uſurper to the ſame Church, becauſe it was full of him, and he muſt firſt be removed by a *Quare Impedit*, but he might by his Letters Patents confirm the Title of ſuch Incumbent, reciting the Uſurpation, *&c.* but then he muſt be compleat Incumbent, for if he was only inſtituted and not inducted, ſuch confirmation would not bar the King, but he might bring a *Quare Impedit*, and remove the Clerk of the Uſurper, becauſe he was not in Poſſeſſion when the Confirmation was made.

But now the Law is, that there can be no Uſurpation upon the King, where he hath an Inheritance in the Advowſon, ſo as to bar his Right, for the Law protects it, that he can receive no prejudice by any Uſurpation.

This was denied, (*r*) *Anno* 18 *Eliz.* (*viz.*) That the King had no manner of prerogative in this Caſe, tho' he claim in his own Right, becauſe 'tis neceſſary that the Church ſhould be full of ſome Body, and as he might gain the Poſſeſſion by a Preſentation without a Title, ſo he might be put out of Poſſeſſion by a double Uſurpation.

(*p*) 2 Cro. 355. (*q*) Yel. 71. 6 Rep. 29. (*r*) Dyer 351. 2 Cro. 54.

But the Chief Juſtice *Anderſon* was of a contrary Opinion, that a double Uſurpation did not bind the King's Right, for as he could not be diſſeiſed of Land, ſo he could not be put out of Poſſeſſion of an Advowſon by any Uſurpation; 'tis true, he may be put out of Poſſeſſion of thoſe things which are tranſitory, but not out of an Inheritance, and according to his Opinion, a Writ of Error was brought * upon that Judgment, and it was reverſed in *B. R.* becauſe the Law ſo protects the King's Inheritance, that no wrong done by a Subject ſhall diveſt him of his Right; but in this caſe he muſt bring a *Quare impedit*, † for he cannot preſent till the Incumbent is removed.

As to the King's preſenting by Uſurpation (*a*) there has been a diſtinction made, that if he preſents generally without reciting any Title it may be by Uſurpation, but if he recites a Title where he hath none, that ſhall never be taken to be by Uſurpation, for he was miſtaken in his Title, and can do no wrong to any body (*b*), ſo that the Uſurpation muſt be in the Incumbent who procured himſelf to be inſtituted upon ſuch a Preſentation (*c*), and he is the wrong doer, and the *Quare impedit* muſt be brought againſt him, and he may be removed 20 years afterwards, for the Preſentation is void, and the true Patron was never out of Poſſeſſion.

'Tis true, the Court was of Opinion, that the King might preſent by Uſurpation (*d*), and yet they held that he could not do any wrong, which ſeems to be a plain Contradiction, but it was ſolved by this diſtinction, (*viz.*) that it was not the preſentation by the King, but the inſtitution by the Biſhop which made the Uſurpation, and yet they held that could not properly be a wrong, becauſe it was a judicial Act.

Where he ſhall have a Writ to the Biſhop.

If the King recover in a *Quare impedit* againſt the Incumbent, who claimed by Collation from the Biſhop, and hath another *Quare impedit* depending againſt the ſame Biſhop for the ſame Church, tho' theſe Suits are commenced upon ſeveral Originals, yet the King ſhall not have a Writ to the Biſhop upon the firſt Judgment, until the other Action is determined, becauſe there are ſeveral Defects ſuppoſed to be in theſe ſeveral Actions, and he muſt recover againſt all before the Title can be apparent in him.

---

* Yel. 90. 1 Brownl. 166. † Roll. Abr. 372. (*a*) Hob. 302. (*b*) Cro. Car. 592. (*c*) Hutt. 66. Vaugh. 14. (*d*) Sid. 163.

If in a *Quare impedit* (*e*) brought, it ſhould appear upon the pleading, that neither the Plaintiff or Defendant have a Title, but that the Preſentation is in the King, the Court may award the Writ to the Biſhop for him, and that may be done without his requeſt, becauſe the Judges are of his Council.

This was my Lord *Hobert*'s Opinion (*f*) in *Colt* and *Glover*'s Caſe, but that it would be otherwiſe if the Verdict found a Title in the King, where he was no party to the Action, becauſe 'tis out of the Iſſue, and meer Surpluſage, which might be anſwered by either Party.

But if the King ſhould bring a *Quare impedit*, and upon (*g*) the pleading the iſſue ſhould be whether he had the *whole* Advowſon or not, and the Jury find that he had a *third part* and no more, but that it was his turn to preſent to that very Avoidance, altho' the Iſſue is found againſt him, yet he ſhall have a Writ to the Biſhop, becauſe the matter found by the Jury was not quite out of the iſſue, and it appeared by the Verdict that he had a Title.

So that the King's Title muſt appear upon the Record in pleading, and not upon Evidence where he is no party to the Action, and his Title thus appearing, the Court may award a Writ to the Biſhop to admit his Clerk.

Where his Incumbent ſhall be Ouſted.

If the King ſhould preſent by Uſurpation, and his Clerk ſhould be inſtituted, and then a *Quare impedit* is brought againſt him, (for it cannot be brought againſt the King) (*h*) and then he preſents another who is inſtituted and inducted, if the Plaintiff doth recover, this ſecond Clerk ſhall be Ouſted by that Judgment, becauſe he came in before the firſt Clerks Title was determined.

So if ſuch Preſentee ſhould be inſtituted and inducted, and then reſigns pending an Action brought againſt him, and the King preſents another (*i*), and then the Plaintiff in the Action recovers this laſt Incumbent ſhall be removed, tho' the Judgment was not had till ſix Months after the Induction, becauſe he came in *pendente lite*.

'Tis true, Serjeant *Anderſon* (*k*) and the Queen's Council, *Anno* 21 *Eliz.* where of a contrary Opinion, and their reaſon was, becauſe this ſecond Incumbent who came in by the reſignation of the other was neither party or privy to the Action; but my Lord *Dyer*, who reports the Caſe, tells us, that their Opinion was not Law, for if there are ſeveral Incumbents

(*e*) 1 And. 53. 1 Leon. 323. (*f*) Hob. 163. (*g*) 2 Roll. Abr. 386. (*h*) 6 Rep. 52. (*i*) 2 Roll. Abr. 391. (*k*) Dyer 364.

ſucceſſive, and they come in *pendente lite*, they ſhall be ſeverally removed, and ſo my Lord *Coke* (*l*) ſays, that to his knowledge it was adjudged.

But eight Years afterwards when Serjeant *Anderſon* was Chief Juſtice of the Common Pleas, he took notice what my Lord *Dyer* had reported of him, whoſe Book was printed but four Years before, and he tells us, it was his Opinion, that ſuch Clerks ſhould not be removed (*m*), and that he was ſtill of the ſame mind, but with this diſtinction, that if the Incumbent came in by vertue of a Title Paramount to that of the Plaintiff in the Action, in ſuch caſe he ſhould not be removed, but if he came under a Title which accrewed ſince that of the Incumbent, then he ſhould be removed.

If the Plaintiff in a *Quare impedit* (*n*) ſhould recover, and before he hath any Writ to the Biſhop he ſhould be Outlawed, then the Incumbent reſigns, and the King ſuppoſing he had a Title by the Outlary, preſents him again, and he is inſtituted and inducted, and then the Outlary is reverſed, the Plaintiff ſhall have a *ſcir. fa.* to have Execution of his Judgment, becauſe nothing was forfeited by the Outlary, but the *Preſentation*, and by the reverſal the party was reſtored to what he had forfeited, that is, to his Title to preſent, and by conſequence the King had none.

Of his right to preſent whilſt the Temporalties are in his hands.

The Temporalties of Biſhops are ſuch Lands and Lay-Fees as have been annexed to their Sees, either by Kings or other great Perſons, and which they enjoy as they are Barons of Parliament, and are diſtinguiſhed from the Spiritualties, which are thoſe Profits which they receive as Biſhops and not as Barons, ſuch are the Duties of Viſitation, of ordaining and inſtituting Prieſts, *&c.*

When theſe Temporalties are ſeiſed by the King, he hath the priviledge to preſent to ſuch Benefices which become void during the Seiſure, and to ſuch which ſhall become void after the death of any Biſhop, and before ſuch Seiſure, and likewiſe to ſuch where the Biſhop in his Life time had preſented or collated if the Clerk was not inducted before his death, becauſe the Church is not full againſt the King till Induction.

And as he may preſent in the caſes before (*o*) mentioned, ſo he may revoke ſuch Preſentation, and if the Preſentee ſhould afterwards be inducted, and then the King ſhould confirm his Preſentation, reciting that he was Canonically

(*l*) 1 Roll. Rep. 213. (*m*) Gouldſ. 105. (*n*) 2 Roll. Abr. 391. Moor 263. 3 And. 179. (*o*) Dyer 292, 2.

Inſtituted

Inſtituted upon it; tho' by this means the Preſentee is reputed to be his Clerk, and ſhould die incumbent on the Benefice, yet the King ſhall preſent again, for he was miſtaken in his Confirmation, becauſe the Incumbent was never in upon his Preſentation, that being revoked before he was inſtituted, and ſo the Confirmation is void.

Therefore the new Biſhop ought to take care that the King do preſent upon ſuch Intruder, or by ſome judicial act to declare that the Church is void, and ſo to ſequeſter the Profits if the King ſhould refuſe to preſent.

Of his right to preſent upon an Avoidance by Ceſſion.

I have treated at large of this matter under the Title *Ceſſion*, and therefore ſhall only add in this place, that the King hath a right to preſent in this caſe; but then he muſt take Advantage of the firſt Avoidance (*p*), and not ſuffer another to preſent, for if ſuch Preſentee ſhould die incumbent, his Prerogative ſhall not extend to give him a ſecond turn.

This is a Prerogative which operates not only upon an Avoidance, but it muſt be upon an Avoidance by Creation, and therefore if the Benefice is to be held in *Commendam* with the Biſhoprick, and the Biſhop afterwards reſigns, or is tranſlated to another Biſhopprick, the King ſhall preſent, becauſe the Diſpenſation is determined by his removal, and then the Church is void by his being made a Biſhop.

But if the Biſhop dies (*q*) before Reſignation or Tranſlation, then the Church becomes void by his death, and in ſuch caſe the Patron and not the King ſhall preſent, becauſe the *Commendam* to hold his Benefice with his Biſhoprick, was as advantageous to the King as a Preſentation, it keeps the Church full, and by conſequence there is no Avoidance, upon which the Prerogative may operate, for the Incumbent is ſtill in upon his (*r*) old Title, tho' made a Biſhop, ſo that the Avoidance may happen upon his Death or Reſignation, but not by his being made a Biſhop (*ſ*); but this muſt be underſtood where he obtains a *Commendam retinere* after he is Elected, and before he is Conſecrated, for if it comes after his Conſecration, it ſhall not amount to a Preſentation to ſatisfie the King's turn, becauſe the Church is then actually void, and the King may preſent.

I ſhall conclude this Title with a Caſe which happened *Anno* 2 *Will.* (*t*), it was an Ejectment for the Rectory of great

(*p*) 2 Cro. 691. 2 Roll. Abr. 343. Moor 399. Vaugh. 19. Caſes in Parliament 164. Cro. Eliz. 790. (*q*) Vaugh. 27. (*r*) Davis 77. (*ſ*) Vaugh. 29. (*t*) Jones and Haſcard.

Halſey in Oxfordſhire, of which one *Redding* was Incumbent, who in *February* 1687, accepted another Benefice with cure, *&c.* without a Diſpenſation, ſo that the firſt Living being void, and neither the Patron or Ordinary preſenting in their reſpective turns the Title came to the King, and the Church afterwards became actually void, and the Biſhop collated the Plaintiff, who at a Trial at Bar was nonſuit, becauſe he could not have a Title from the Biſhop after it was gone from him to the King.

Where the Preſentment ſhall be void and revoked.

If he preſents to a Church and miſtakes his Title, 'tis void as if he preſent *ratione Lapſus*, when it appears he had a Title *jure pleno*, 2 *Cro.* 252. 2 *Roll. Ab.* 350.

Anno 18 *Eliz.* it was made a Queſtion, that if the King's Preſentee upon a Laps (*u*) ſhould die after Inſtitution and before Induction, whether he ſhould preſent again or not? And it was adjudged he ſhould, becauſe he had not the effect of his firſt Preſentation; for the Incumbent dying before Induction, that was a revocation of his preſentment in Law.

So if he preſent one, and afterwards (*x*) preſents another without any actual revocation of the firſt Preſentation, yet this ſecond Preſentation is a revocation in Law of the firſt, unleſs it was obtained by deceiving the King, pending a *Quare impedit* brought by him.

If the King ſhould die before his Clerk is Inſtituted this is a revocation in Law, but if he actually revoke it before Inſtitution, and afterwards the Clerk ſhould be Inſtituted and Inducted before the Biſhop had notice of the revocation, yet the Preſentation is legally revoked; for notice to the Biſhop is not material as to the ſubſtance of the Revocation, 'tis only to make him chargeable as a Diſturber if he proceeds to give Inſtitution after notice.

Laſtly, Such is the King's Prerogative, that he may revoke his Preſentation at any time before Inſtitution, and ſome have held even after a Mandate for Induction if before 'tis executed.

In what caſes his Lands are privileged from paiment of Tithes and what not.

He is *perſona mixta*, and therefore as he is capable of having Tithes, ſo he may preſcribe *in non decimando*, but this is a perſonal Privilege which *nunquam egreditur perſonam*, and therefore if he grant thoſe Lands to another, the Grantee ſhall not be diſ-

(*u*) 2 Roll. Abr. 353. 9 Rep. 132. (*x*) 2 Roll. Abr. 354. 1 And. 38. Lane 103.

charged,

charged (y), becauſe a Subject cannot partake of the King's Prerogative.

But if he make a Leaſe of ſuch Lands, the Leſſee ſhall be diſcharged of Tithes, becauſe the Reverſion is in the King (z), and ſo the Priviledge ſtill continues.

There is a ſhort Note in *Brownlow*, * that the Court was of Opinion if the King hath ancient *Forreſt Lands* diſcharged of Tithes, and he grants thoſe Lands to another, that the Grantee ſhall be diſcharged of Tithes, which is contrary to the latter Authorities.

Lapſe.

WHEN a Patron neglects to preſent a Clerk to a Benefice within ſix Months after 'tis void, then 'tis lapſed to the Biſhop, and if he doth not callate within ſix Months following, it Lapſes to the Archbiſhop, and if he neglects to collate within his ſix Months it Lapſes to the Queen.

And here I ſhall treat,

(1.) Of the reſpective Rights of the Ordinary, and of the Queen to preſent by Lapſe, and in what caſe it muſt be done.

(2.) Where the Biſhop ſhall be entituled to collate on a Lapſe and where not.

(3.) Where after a Lapſe incurred, the Biſhop ſhall have no benefit by it.

(4.) How the ſix Months ſhall be computed, and from what time.

Of the reſpective Rights of the Ordinary and the Queen.

My Lord *Hobert* tells us, that a Lapſe is not an intereſt veſted in the Perſon, but a truſt in Law to do that for the Patron which 'tis ſuppoſed he would have done himſelf (a), but had neglected it, and therefore that a collation by Lapſe is *jure devoluto* and in right of the Patron.

But this is denied by the learned Biſhop of *Worceſter*, (*viz.*) that the Ordinary in ſuch caſe preſents *jure pleno*, becauſe the whole Dioceſs at firſt was under the care of the Biſhop, and it was a particular indulgence to Patrons, that they had any right to preſent to vacant Churches, which if they neglected, then it returns to the ancient Right, and the Biſhop preſents as having an Intereſt in it, and not otherwiſe.

(y) Moor 486. Jones 387. Stiles 137. Cro. Eliz. 785. (z) Het. 60. * 1 Brownl. 31. (a) Hob. 154.

'Tis

'Tis true there is afterwards a *Devolution* allowed by our Law, and that is from the Biſhop to the Metropolitan, not as Ordinary, but as Superior, which is diſtinct from that right which the Biſhop hath by Lapſe.

I grant that the Archbiſhop in ſome reſpects may be ſaid to be the Ordinary of the whole Provence, but that is to ſupport the defects of his Suffragans, and not in reſpect of any immediate Juriſdiction.

In the ſame manner it devolves to the Queen, who *jure Coronæ* is to ſee all places ſupplied with Perſons fit for them, and if thoſe entruſted by Law neglect their Duties, then by the natural Order of things it falls to the Supreme Power which is to ſupply the defects of all others.

Some have been of Opinion, that before the Council of *Lateran* there was no ſuch thing as a Lapſe to the Biſhop, but that if the Patron neglected to preſent, in ſuch caſe the Biſhop was to provide one to ſerve the Cure, and the Patron might preſent at any time.

This was the Opinion of Mr. *Selden* (*b*) and my Lord *Coke*, who cites *Bracton* and *Fleta* to maintain it; he would not mention *Britton*, probably, becauſe he calls it the Council of *Lyons*, which he did miſtake for *Lateran*.

It had been more to the purpoſe if he had cited the Conſtitution of Pope *Alexander* the 3d, which he ſent hither to this effect, (*viz.*) That if difference happened about the right of Patronage, the Biſhop might ſequeſter the Profits without fixing any time.

But there is nothing in theſe old Law-Books to juſtifie an unlimitted Power which the Patron had to preſent before that Council, the words tend almoſt to the ſame ſenſe in both thoſe Books.

Cum propter lapſum temporis de conſtitutione Laterenſe ſi partes fuerint diſcordes ultra ſex menſes pertinebit ad Ordinarium collatio niſi partes conſentiriat de unica perſona idonea preſentanda; which is no more then if a Diſpute ſhould happen about the right of Patronage, the Biſhop might collate ſix Months after the Avoidance, it doth not ſay that the Patron might preſent at any time.

And this agrees with the Regiſter (*c*), which is the moſt ancient Book of the Law, where we have a Writ of Prohibition to the Biſhop of *London*, ſignifying that it was according to the Law and Cuſtom of *England*, that Biſhops ſhould

(*b*) Seld. Hiſt. Tithes 389. 2 Inſt. 361. Bract. 341. Fleta lib. 5. cap. 14.
(*c*) Reg. 42, b.

not

not preſent by Laps before ſix Months are paſt after the Avoidance, and that they had not uſed ſo to do, *aliquibus temporibus retroactis.*

St. *Germin* (*d*), who wrote *Anno* 23 *H.* 8. is of the ſame Opinion, that by the Common Law all Patrons as well Lay as Spiritual had ſix Months to preſent before a Lapſe ſhould incurr.

Where the Biſhop ſhall be entituled to collate by Lapſe and where not.

'Tis generally true, that after an Avoidance for ſix Months, and no Preſentation made to the Biſhop, he hath power to collate to the void Church by Lapſe; but there are ſome caſes where a Lapſe ſhall not incurr after ſuch an Avoidance.

He may collate by Laps (*e*), where two Patrons pretend a Right, and one ſues the other without naming the Biſhop, and recovers, and the ſix Months paſs pending the Action, for in ſuch caſe the Biſhop was in no fault.

So if after ſuch a recovery the Defendant brings a Writ of Error upon the Judgment, and the ſix Months expire before the Errors are determined.

So if a *Quare impedit* (*f*) is brought againſt the Biſhop and Patron, who never preſented any Clerk to him, if the ſix Months expire the Biſhop ſhall collate, tho' his Title accrewed by Lapſe pending the Writ, for he was no Diſturber, (*g*) and 'tis unreaſonable he ſhould looſe his Title by fraudulent Action brought againſt him.

If his Title ſhould accrew in the viſitation of the Archbiſhop, and whilſt the Ordinary is inhibited, by which inhibition all Acts of Juriſdiction are for a time ſuſpended, tho' he cannot inſtitute a Clerk himſelf, yet he ought to preſent him to the Archbiſhop, who is to do it.

So if the Biſhop (*h*) collate, and before his Clerk is inducted, the Patron preſents, in this caſe the Biſhop may refuſe him.

But in theſe caſes following a Lapſe ſhall not incur after ſix Months Avoidance, (*viz.*)

If the Biſhop refuſe a Clerk without cauſe, and then the Church becomes litigious, no Lapſe ſhall incurr. So 'tis if he refuſe to examine a Clerk preſented. (*i*)

If a *Quare impedit* is brought againſt Biſhop, Patron, and Clerk, and the Biſhop claims nothing but as Ordinary, and

(*d*) Dr. *and* Stud. 116, b. (*e*) 2 Roll. Abr. 365. Hob. 201. 2 Cro. 93. (*f*) Hob. 270. 2 Roll. Abr. 366. (*g*) 2 Roll. Abr. 357, 367. (*h*) Dyer 277. (*i*) 2 Roll. Abr. 366. Plito. 3, 5, 6.

the

the Plaintiff recovers, and then the Patron and Incumbent join in a Writ of Error upon that Judgment, pending which Writ the Biſhop dies, and another is conſecrated, then the Incumbent takes another Benefice with cure, ſo that the firſt is void, and the ſix Months paſs, and then the Judgment is affirmed, the Ordinary ſhall not be entituled to preſent by Lapſe.

Where after a Lapſe the Biſhop ſhall have no Benefit by it.

In ſome Caſes the Biſhop ſhall have no Benefit after a Lapſe incurred; as if the Patron Preſents before the Biſhop Collates, he is bound to admit his Clerk, becauſe he is only to ſee that the (*a*) Church is ſerved, which is now done by the Patron himſelf.

So 'tis if the Lapſe devolves on the *Metropolitan*, and before he Collates the (*b*) Patron Preſents to the Biſhop of the Dioceſs.

So if the Ordinary neglects, and within his Six Months the (*c*) Archbiſhop ſhould Collate, yet if within that time the Patron Preſents, his Clerk ought to be received, becauſe the Collation by the *Metropolitan* was Wrong, and therefore void againſt the Patron.

And it was my (*d*) Lord *Hoberts* Opinion that the Patrons Clerk ought to be admitted, after a Lapſe is come from the Archbiſhop to the Queen, if his Preſentation is Exhibited to the Ordinary before She Preſents, becauſe his Right continues till the Title by the Lapſe is Executed; for he held that a Lapſe doth not veſt ſuch an abſolute Title in the Queen that She may Preſent at any time, for then there could be no ſuch Uſurpation upon ſuch a Title, which is contrary to the Judgment in (*e*) *Beverley*'s Caſe; and if an Uſurpation ſhall be allowed againſt a Lapſed Title to the Queen, certainly the True Patrons Title will prevail, but this muſt be underſtood where the (*f*) Clerk dies Incumbent upon ſuch uſurped Title, for the Queen may remove him at any time whilſt he is Living.

How the Six Months ſhall be Computed, and from what time.

It hath been a Queſtion how the Six Months ſhall be Computed, in which the Patron and Ordinary are reſpectively to fill the Church after an avoidance, that is, whether it ſhall be by (*g*) Kalender or Lunary Months, but 'tis now ſettled that it muſt be by Kalender, *viz.* 182 Days for Half a Year, becauſe this computation was made by Churchmen, and this likewiſe concerns the Affairs of the Church.

(*a*) 2 Rol. Abr. 367. 1 And. 149. (*b*) 2 Rol. Abr. 348. Hutt. 24. (*c*) 2 Rol. Abr. 368, 369. (*d*) Hob. 157. (*e*) 1 And. 148. (*f*) 7 Rep. 28. 2 Cro. 216. (*g*) Yel. 100. 6 Rep. 61. *a*. 2 Cro. 166. 2 Inſt. 360.

By

By the Statute of *W.* 2. *cap.* 5. 'tis Enacted, That if the Patron is diſturbed for Six Months, ſo as the Biſhop Preſents by Lapſe, he ſhall recover damages to two years value of the Church, and if the Six Months are not paſſed, and the Patron proves his Title within that time, then he ſhall recover damages to Half a Years value of the Church.

Now, theſe different Expreſſions of Six Months and Half a Year, do not make the time diſtinct in Computation, but one Expounds the other, *viz.* where 'tis ſaid that the diſturbance is for Six Months, ſo as the Biſhop Preſents by Lapſe, *&c.* that concerns the Prelates, for the words are properly applicable to them; but where 'tis ſaid Damages ſhall be recovered to Half a Years value, that concerns the Laity, and ſhews how they are to be puniſhed for a Diſturbance.

This being the manner of Computation, the next Queſtion will be, from what time the Six Months muſt commence?

And as to that the Law is, *viz.* if the Clerk is deprived, or reſigns, the (*i*) Church ſhall not Lapſe till Six Months after notice thereof, which notice the Ordinary muſt give to the Patron, and in ſuch Caſe the time ſhall not be computed from the actual avoidance, and if the Ordinary ſhould Die his Succeſſor is bound to give the like notice, for if he will take that advantage which his Predeceſſor might do, 'tis reaſonable he ſhould perform that which the other ought to have done.

And becauſe a Deprivation *ipſo facto*, differs from that which is occaſioned by a Declaratory Sentence in the Spiritual Court, therefore by the Statute 13 *Eliz. cap.* 12. 'tis provided, That no Title to preſent by Lapſe ſhall accrew upon any ſuch Deprivation, but after Six Months notice given to the Patron by the Ordinary; and it being in the Caſe of a Penal Statute, the Patron is not obliged to take notice from any Perſon but from the Biſhop himſelf, and it muſt be Perſonally if he Live in the ſame County, and no other notice is ſufficient, *Dyer* 369. 1 *Leon.* 31. *Cro. Eliz.* 119.

But if the Patron lives in another County than where the Biſhop reſides, notice may be Publiſhed, by fixing the very cauſe of Deprivation on the (*k*) Church Door.

Where the (*l*) Clerk is refuſed for Illiterature, there the Six Months ſhall incur from the actual avoidance, and not from the time of notice given, *&c.* becauſe a (*m*) Patron ought to Preſent a Clerk who is qualified, otherwiſe his Preſentation is void.

(*i*) Keilw. 49. b. 1 And. 62. 3 Leon 45. (*k*) Dyer 346. *b.* (*l*) Dyer 227. *b.* (*m*) 4 Mod. 140.

Leaſes

Leaſes by Eccleſiaſtical Perſons.

AT Common Law a Biſhop, Abbot, Prebend or any other Single, Spiritual Corporation could not make a Leaſe for longer time than he continued Biſhop, *&c.* but then they might make any Eſtate whatſoever to bind their Succeſſors, ſo as it was confirmed by the Dean and Chapter.

As the Biſhops had too little Power alone without their Chapters, ſo being joyned with them they had too much, and therefore it was thought expedient that the Law ſhould be altered.

The firſt Statute which made any alteration in this Caſe was, *Anno* 32 *Hen.* 8. *cap.* 28. which is commonly called the Enabling Statute, becauſe it gave Biſhops power to make Leaſes of their Lands, which they had in right of the Church, either for 21 years or three Lives, without any confirmation, which they could not do before.

This Act relates only to Biſhops, it did not extend to Parſons and Vicars; they had no manner of Liberty to make (*n*) Leaſes otherwiſe than they might have done before; 'tis true, a Prebendary is within the equity of it, though he is not ſeiſed in the right of the Church, but of his Prebend, and ſo is a (*o*) Chancellor, who had a Rectory meerly as Chancellor, and made a Leaſe thereof without confirmation, for he is not *inter minores ordines qui famulantur Eccleſiæ.*

But thoſe Leaſes which Biſhops make purſuant to this Act muſt have theſe Reſtrictions,

(1.) They muſt be made in Writing Indented.

(2.) Every ſuch Leaſe muſt be made to commence from the making, or the day of the making thereof.

And as to this matter there is a diſtinction when the Leaſe is made for Years, and when 'tis for Lives, for if 'tis made for Three Lives *habendum*, from *Michaelmas* next 'tis void, becauſe Tythes cannot paſs by way of Reverſion, tho' they may by way of (*p*) Diſcharge or Reteiner.

This muſt be intended upon the Act 1 *&* 13 *Eliz.* and not upon the 14th. which enables Clergymen to make Leaſes of Houſes in Towns, for there a Leaſe to begin from a time to come is good, ſo as it doth not exceed the (*q*) Term of 40 Years.

(3.) If there is an old Leaſe in being it muſt expire or be ſurrendred, within a Year after the making the new Leaſe.

(*n*) 4 Leon. 51. (*o*) Sid. 158. 1 Lev. 112. (*p*) Yel. 131.
(*q*) Poph: 9.

This

This muſt be underſtood where the Biſhop makes a new Leaſe without confirmation, for if there is more than a (r) Year in being at the time of the making the new Leaſe, if 'tis confirmed by the Dean and Chapter 'tis good.

(4.) There muſt not be a double (ſ) Leaſe in being, at one and the ſame time, that is, one for Years, and another for Life.

As to (t) Leaſes made for Three Lives, they muſt not be to one for Life, remainder to another for Life, *&c.* but the Lives muſt all ware together, for if made otherwiſe ſuch Leaſes are voidable.

Neither can a Biſhop make a (u) Leaſe for 99 Years, determinable upon Three Lives, but a Leaſe to one for Three Lives is good, becauſe 'tis the ſame in effect as a (x) Leaſe to Three for their Lives.

(5.) The Leaſe muſt be made of Lands, Tenements or Hereditaments, out of which an *Annual Rent* may be reſerved, and not of things which lay in grant, as Fairs, Markets, Tythes, *&c.*

(6.) It muſt be made of Lands which have been uſually Lett, for the greateſt part of 20 Years, next before the making the new Leaſe.

Copyholds, tho' they are Eſtates at will, yet they do not fall under this (y) Reſtriction becauſe they are uſually Lett.

My (z) Lord *Coke* was of opinion, That if Lands were in Leaſe for Eleven Years next before the making a new Leaſe, 'tis ſufficient, for in ſuch Caſe it ſhall be taken to be uſually Lett.

But Juſtice *Twiſden* was of a contrary Opinion, *viz.* That the words muſt be intended of a longer time in Leaſe; for Lands which have been but once Lett, and that for ſo few Years, cannot in propriety of Speech be ſaid to be uſually Lett.

'Tis true, Eleven Years comprehends the greateſt part of 20 Years, and ſo is within that Reſtriction, but not within the other, of being uſually in Leaſe.

The words may be taken in two Senſes, the one for the repeated act of (a) Leaſing, the other for the continuance of the Lands in Leaſe, and therefore Lands Leaſed many Years before the making the new Leaſe (tho' but for once) may be ſaid to be Lands uſually demiſed, and this is the received ſenſe of the Words.

(r) 4 Leon. 78. (ſ) Cro. Eliz. 440. Moor 253. 5 Rep. 2. *Elmer's* Caſe. 1 Mod. 204. (t) Cro. Car. 95. 6 Rep. 37. 4. (u) 8 Rep. 70. *b.* (x) 2 Cro. 76. (y) Moor 759. (z) 1 Inſt. 44. *b.* (a) Vaugh. 33. 34.

So

So if Lands have been anciently Leaſed for Lives, and afterwards kept in the (*b*) Biſhops Hands for Twenty Years before he makes a new Leaſe, this ſeems to be a good Leaſe to bind the Succeſſor, for the intent of the Law was not to tie the Biſhop ſtrictly to the words of the Statute, but to preſerve the ancient Rent, but it muſt be once Demiſed, otherwiſe it cannot be known what was the ancient Rent.

(7.) The *Reddendum* muſt be ſo much Rent which hath been uſually paid for the Land, within 20 years before the making the new Leaſe, and made payable to the Biſhop and his Succeſſors.

But if Lands are uſually Lett for three Lives, under a certain Fine, and an Heriot upon the Death of every Tenant, and a new Leaſe is made reſerving the yearly Rent, and omitting the Heriots, yet the (*c*) Leaſe is good, becauſe an Heriot is a Service, and not properly any *annual Rent*, or depending upon it.

So if a Biſhop grants the next avoidance, it ſhall bind the (*d*) Succeſſor, for tho' there cannot be a Rent reſerved out of it, yet 'tis an Hereditament.

And tho' there may be ſome variations in former Leaſes, yet if in the new (*e*) Leaſe the ſame Rent is reſerved which was in the very laſt Leaſe before it, this ſhall be accounted the ancient Rent.

There is a very nice (*f*) Caſe relating to this matter, which is thus, The *Petty Canons* of St. *Paul*'s Church made a Leaſe to *Husband and Wife*, of the Rectory of St. *Gregorie*, rendring 40*l.* *per Annum*; and the *Husband alone* covenanted to *pay* yearly a couple of Capons; but in the laſt Leaſe before this there was 40*l.* *per Annum* reſerved, and a couple of Capons. My Lord *Hales* held this preſent Leaſe to be void, becauſe in the former Leaſe the Capons were reſerved, and made part of the Rent, but in the new Leaſe there was only a Covenant to pay them, which would not bind the Wife if ſhe ſurvived, and therefore it would not amount to a reſervation, which it might have done if both had Covenanted; and in this Caſe a diſtinction was made between a ſole and aggregate Corporation, (*viz.*) That if a Sole Corporation makes a Leaſe not warranted by the Statute 13 *Eliz.* it ſhall bind him, but not his Succeſſor, but if a Corporation aggregate make ſuch a Leaſe, 'tis void themſelves.

'Tis plain, that by this Paragraph there muſt be a certain and determinate Rent expreſſed in the new Leaſe; and

(*b*) Cro. Eliz. 375. Sid. 416. (*c*) 6 Rep. 38. 2 Cro. 76. (*d*) Cro. Eliz. 440, 690. (*e*) Hardres 326. (*f*) Hardres 352.

therefore

therefore where a (g) Biſhop made a Leaſe, rendring the uſual and accuſtomed Rent to him and his Succeſſors, and not mentioning how much, ſuch Leaſe is void.

But if a whole Farm ſhould be lett out in parcels, which had been uſually lett together, there a full Rent, *pro rata*, makes the Leaſe good, becauſe the Succeſſor hath no prejudice.

The Biſhops were enabled by this Act to make Leaſes for three Lives, or Twenty one Years, without any confirmation by the Chapter; but yet they were not reſtrained from that ancient and large Power which they had before, in making long Leaſes with confirmation; and therefore *Anno* 1 *Eliz. cap.* 13. it was enacted, *That all Eſtates made by Biſhops, of any Lands or other Hereditaments, being parcel of the Poſſeſſions of his Biſhoprick, or united, or appertaining to the ſame, other than for Twenty one Years or three Lives, from the time of the making thereof, and whereupon the accuſtomed* **yearly Rent**, *or more ſhall be reſerved, and payable yearly, during ſuch term of Years or Lives, ſhall be void.*

Before I ſhall treat more particularly of this Act, I muſt take notice that there is a difference between (h) Leaſes made by Biſhops *de facto* and *de jure*, for a Leaſe made by a Biſhop *de facto*, tho' confirmed by the Dean and Chapter, ſhall not bind the Succeſſor, becauſe 'tis a voluntary act, which he might have omitted without prejudice, but all Admiſſions and Inſtitutions by ſuch a Biſhop are good. 'Tis to be obſerved, that this is a Private Act of Parliament, for it concerns the Biſhops only, therefore it muſt be Pleaded; and likewiſe, that a Leaſe made purſuant to this Act, muſt have all the reſtrictions required by the Act 32 *Hen.* 8. It was made purely for the benefit of the Succeſſor; and therefore where a Leaſe made by a Biſhop is not prejudicial to his Succeſſor, tho' it want ſome of thoſe circumſtances mentioned in the Act 32 *H.* 8. 'tis good; as for inſtance, if the Leaſe is of Lands *habendum a datu Indenturæ*, rendring the ancient Rent, and confirmed by the Dean and Chapter, tho' there was four Years of a former term then in being, yet 'tis not void, becauſe there is no injury done to the Succeſſor; 'tis true, it cannot commence in intereſt preſently, becauſe the former Leaſe was not expired, but it commences immediately by Eſtoppel, ſo that the Succeſſor will have two Rents, one in Intereſt, and the other by Eſtoppel.

'Tis true, ſuch (i) a Leaſe is void upon the Statute 32 *H.* 8. becauſe there was a former Leaſe in being; but 'tis not ſo up-

(g) Cro. Car. 95. (h) 2 Cro. 152. (i) Moor. 107, 253. 4 Rep. 78. 5 Rep. 2.

on this Act 1 *Eliz.* for 'tis capable of a confirmation, and being confirmed ſhall bind the Succeſſor.

But no confirmation will make a double Leaſe good, that is, where a Leaſe for lives is made before a Leaſe for years expires, becauſe this Statute is in the diſjunctive, *viz. That a Leaſe ſhall not be good other then for Twenty one Years, or three Lives,* which ſhews that both cannot be good at the ſame time.

Beſides, the *accuſtomed yearly Rent* muſt be payable, during the term of years or lives, which cannot be in this Caſe, for if (*k*) the Leſſee for life ſhould enter, the Succeſſor hath no remedy againſt him for the Rent, either by Diſtreſs or Action of Debt, if the Leaſe for years is not expired; and he cannot have any Aſſize becauſe he never had any Seiſin, ſo that there is a poſſibility that the Leſſee for life may be for ever diſcharged of the Rent, becauſe he may die before the Leaſe expires; but if he ſurvive, then the Succeſſor hath a remedy for the Arrears.

Under this Statute I ſhall conſider,

(1.) What ſhall be accounted *parcel of the Poſſeſſions of the Biſhoprick.*

(2.) What ſhall be taken to be the *accuſtomed Rent.*

As to the firſt of theſe particulars, there are ſome *Offices* which may be taken as *parcel of the poſſeſſions of a Biſhoprick,* or at leaſt as appertaining to the ſame; and tho' the Biſhop cannot execute ſuch Offices himſelf, yet he hath an inheritance in the gift and diſpoſal thereof, and thoſe are ancient Offices, which the Biſhop may grant with (*l*) the ancient Fees, and this being confirmed by the Dean and Chapter is good by the intention, and within the equity, tho' not by the words of this Statute.

But tho' ſuch grants are allowed for neceſſity, yet they ought not to be accompanied with a new Fee, for that would be ſome diminution of the Revenue, and would ſo far impoveriſh the Succeſſor, and 'tis agreed on all hands that this Statute was made for his benefit.

Therefore, if a Biſhop is ſeiſed in fee of a Park, and the Keeper had been an ancient Officer there, if the Biſhop ſhould grant that Office with (*m*) the ancient Fee, *nec non cum Paſtura pro duobus equis in eodem Parco,* and this grant ſhould be confirmed by the Dean and Chapter, 'tis void as to the Paſture, becauſe 'tis a new thing, which was not granted before, and 'tis ſtill doubtful whether it would not make the grant void,

(*k*) 5 Rep. 2, 3. 1 And. 195. Cro. Eliz. 141. 29. Cro. Car. 47. Ley. 71. (*l*) 10 Rep. 62. (*m*) Bridg.

unleſs

unleſs it can be taken as diſtinct grants, and ſo to make the firſt good, and the other void againſt the Succeſſor, as where the (*n*) ancient Fee hath been encreaſed in a new grant, in ſuch caſe the grant of the Office is good, and of ſo much which was the ancient Fee, but it ſhall be void as to the reſt.

And in all (*o*) theſe caſes of Fees, it muſt appear in pleading, that 'tis an ancient Fee, for tho' the Office is ancient, yet if the Fee is not ſo, the grant will be void.

And 'tis to be obſerved, that all theſe grants of Offices are to be made as *uſual* before (*p*) the Statute, therefore a grant of an *Official* by an *Archdeacon*, or of a Commiſſary by a *Biſhop*, is void againſt the Succeſſor, if granted in *Reverſion* where it was uſually granted in *Poſſeſſion* before the Statute, for theſe Offices are *Hereditaments*, and belong to Biſhops and Archdeacons, and ſo are comprehended in the very words of the (*q*) Statute; and therefore if they were granted in *Reverſion* ſuch grants may be ſtill made, but then they muſt be confirmed by the Dean and Chapter.

Some are of opinion, that a grant of the Office of a Commiſſary is good but during the life of the Grantor, for tho' an Eccleſiaſtical Juriſdiction may be executed by a Subſtitute, yet his acts are in Law the acts of him who deputes him, and he muſt be anſwerable for them, and not the Deputy; ſo that if ſuch (*r*) a grant ſhould be good againſt the Succeſſor, then he muſt be liable to the acts of a Perſon whom he never deputed, which ſeems to be unreaſonable:

However, (*ſ*) the grant of the Office of *Regiſter* in Reverſion hath been held good; and that 'tis ſufficient evidence to produce but one grant thereof in Reverſion before the Statute, which may be an inducement to believe that it was granted ſo anciently.

Now, tho' this Statute 1 *Eliz.* ſaith, That *all grants made by Biſhops, other then for Twenty one Years, or three Lives, &c. and whereupon the accuſtomed yearly Rent ſhall be reſerved, ſhall be void*; yet a grant for *one Life* is good, but then it muſt be of an ancient and neceſſary Office; for if a Biſhop had not power to grant ſuch Offices for the life of the Grantee, he would be but ill ſerved by Men whoſe Titles would be precarious, but the grant of ſuch an Office to one for life, and afterwards to another in Reverſion is void, and ſo 'tis where the grant is made to (*t*) two for life; as for inſtance, the Biſhop of *Sailsbury* granted the Stewardſhip of his Mannors to two for life, to

(*n*) 2 Brownl. 237. (*o*) 1 Brownl. 182. (*p*) Cro. Car. 258. Jones 263. Winch. Entr. 22. (*q*) 2 Rol. Abr. 154. Jones 311. (*r*) Noy 153. (*ſ*) Cro. Car. 279 Jones 330. March. 38. Cro. Car. 555. 2 Rol. Abr. 153. Winch. Entr. 22. (*t*) 10 Rep. 59.

be exerciſed by them or their Deputies, and 20 Nobles Fee, iſſuing out of Lands, parcel of his Bioſhprick; this grant was confirmed by the Dean and Chapter, but it was held void againſt the Succeſſor; for tho' a Biſhop may grant an ancient Office to one for life, becauſe of the neceſſity of ſuch a grant, yet 'tis not neceſſary that he ſhould grant it to two for their lives.

And if it ſhould happen that after ſuch grant, one of the lives ſhould die in the life time of that Biſhiop who made the grant, and then the Biſhop ſhould die, ſo that there is but one life in being againſt the Succeſſor, yet the grant is void againſt him, becauſe it was void when firſt made, and ſhall never be good by any contingency.

But a grant to one for life muſt be confirmed by the Dean and Chapter, becauſe 'tis a grant at Common Law, 'tis not warranted by this Statute 1 *Eliz.* for that requires it ſhould be for Twenty one Years or three Lives, but a Corporation aggregate may make ſuch a grant without confirmation.

Horne, Biſhop of *Wincheſter*, about four Years after the making this Statute, granted (*u*) a Rent of 4 *l.* out of the Mannor of *Waltham*, being parcel of the poſſeſſions of his Biſhoprick, to Dr. *Dale* a Civilian, for his life, and this was *pro conſilio impenſo & impendendo*, 'tis made a Quere in *Dyer* whether this Leaſe was void againſt the Succeſſor upon this (*x*) Statute, t was agreed to be good againſt the Biſhop himſelf, but it was held void againſt the Succeſſor, becauſe it was not a grant of neceſſity, and it was not of an Office, but only a voluntary act of the Biſhop to chooſe ſuch a Man to be his Council, who might not be approved by his Succeſſor.

What ſhall be accounted the accuſtomed Rent.

(2.) By this Statute the form of the Leaſe is directed, but yet if 'tis made in another manner it ſhall not be void againſt the Biſhop who made it, but only againſt his Succeſſors, who may affirm ſuch Leaſe by receiving the Rent.

Therefore, where a Biſhop made a Leaſe of the Advowſon of an Archdeaconry (*y*) for Twenty one Years, which he had in right of the Church, this is good againſt himſelf, tho' it was not of (*z*) a thing manurable, out of which an yearly Rent could be reſerved, as directed by the Statute, for it was never intended to reſtrain the Biſhop in poſſeſſion, ſo that he could not do any act to bind himſelf or his Lands, during his own time, for then he could not Leaſe any Land which had not

(*u*) Dyer 376. 1 Leon. 205. (*x*) 10 Rep. 61. *b.* (*z*) Cro. Eliz. 609. (*y*) 1 And. 244. Cro. Eliz. 207. 2 Cro. 173. 10 Rep. 60. *b.*

been

been *uſually* lett before the making the Statute, but muſt Manure it by his own Servants; neither could he take any benefit of Waſts, but only the Herbage with his own Cattels.

This was *Biſhop Jewell's* Caſe, who *Anno* 30 *Eliz.* * made a Leaſe of a *Fair for three Lives* reſerving the ancient Rent, this was good againſt himſelf by way of contract between him and the Leſſee, but the Rent was not incident to the Reverſion, therefore the Leaſe was void againſt his Succeſſors.

'Tis true, that at the latter end of that Caſe 'tis reſolved, that the Law would have been the ſame if the Leaſe had been *for twenty one Years*, but 'tis ſince ruled otherwiſe, for if a Leaſe of Tithes is made *for three Lives*, † this is not good againſt the Succeſſor, becauſe nothing was demiſed but Tithes which lie *in Prender*, and no Rent can iſſue out of them, there is no certain place wherein a Diſtreſs can be taken, ** nor any remedy for *Rent* if it ſhould be denied, for the Succeſſor cannot have an Action of Debt for it, becauſe 'tis a Freehold, nor an Aſſize, becauſe there is no Land to be put in view. ††

But if it had been a *Leaſe for Years* (z), there the Succeſſor might have an Action of Debt, not upon the privity of Contract, for he is not in Law privy to the Contract of his Predeceſſor, but upon the privity of Eſtate, for he hath the Reverſion, and 'tis for that reaſon that an Aſſignee of the term ſhall be charged with the Rent, for it is attendent upon the term it ſelf.

So that if a Biſhop makes a Leaſe *for years of Tithes* rendring *Rent*, 'tis good againſt the Succeſſor, becauſe 'tis a Rent which is incident to the Reverſion, and goes to him, which it would not have done, if it had been a Leaſe for *Lives*.

The Statute 32 *H.* 8. requires that a Leaſe made by a Biſhop muſt be of Lands *uſually Lett* for the greateſt part of twenty Years, *&c.* otherwiſe it ſhall be void, and the Statute 1 *Eliz.* gives the Biſhops Power to Leaſe their *Lands* generally without mentioning that the Leaſe muſt be made of *Lands uſually Lett*, *&c.* yet it muſt be made of ſuch Lands or 'tis void (a), becauſe this Statute 1 *Eliz.* requires, that the *accuſtomed Rent* ſhall be reſerved upon every Leaſe, which cannot be if the Land had not been *uſually demiſed*.

So the Statute 32 *H.* 8. requires, that if there be an old Leaſe in being, it muſt expire or be ſurrendered within a

* 5 Rep. 3. † 2 Cro. 111. Moor 778. ** 2 Cro. 173. †† Hardres 326. (z) Raym. 18. 2 Sand. 303, 304. (a) Cro. Eliz. 874, 875.

Year after the making the new Leaſe, all which is omitted in the Act 1 *Eliz.* but yet a Leaſe made purſuant to it is not good (*b*) againſt the Succeſſor if the old Leaſe doth not expire, or ſhall not be ſurrendered within that time, unleſs ſuch Leaſe is confirmed by the Dean and Chapter, but if confirmed, then if there is a Leaſe of twenty one Years in being, the Biſhop may make a new Leaſe of the ſame Lands for twenty one Years more, to commence from the making thereof, which ſhall bind the Succeſſor, and theſe are called concurrent Leaſes, of which I ſhall treat particularly hereafter.

But a Grant of the *next Avoidance* is not good, tho' confirmed by the Dean and Chapter, becauſe 'tis not an *Hereditament* out of which an yearly Rent can be reſerved.

And it muſt be out of an Hereditament *parcel of the Poſſeſſions of the Biſhoprick* (*c*), and therefore if an Archdeacon hath a Parſonage appropriated to his Archdeaconry, and he Leaſes the Glebe for fifty Years, which is confirmed by the Biſhop being Patron, and by the Dean and Chapter this is void againſt the Succeſſor, becauſe this Confirmation paſſed no Eſtate, 'tis no more then an aſſent to the Leaſe parcel of the Poſſeſſions of the Archdeaconry, and not of the Biſhoprick.

So where the Biſhop himſelf granted to the Mayor and Commonalty of *Winton* (*d*), that they might build in the vacant places of the City and dwell there, which Grant was confirmed by the Dean and Chapter, yet the Soil was ſtill in the Biſhop, and his Succeſſors were not bound by that Grant, for it enures only as a Licenſe and no more.

Both the Statutes before-mentioned relate only to Biſhops, the next concerns *Parſons and Vicars.*

Parſons and Vicars.] At Common Law, *Parſons and Vicars* might alien their Glebe with the Confirmation of the Biſhop and Patron, and they had no reſtraint put upon them till *Anno* 13 *Eliz.* (*e*) and then an Act was made which is penned almoſt like the former Acts, and which is a * general Law, for it concerns all the inferiour Clergy, and it requires,

That all Leaſes or Eſtates made, done or **ſuffered** *by Maſters and Fellows of Colleges, Deans and Chapters, Maſters and Guardians of Hoſpitals, Parſons and Vicars, &c. of Houſes, Lands, Tithes, Tenements or Hereditaments, being parcel of the poſſeſſions of the Church other then for twenty one Years or three Lives from*

(*b*) Bridgm. 30. (*c*) Cro. Eliz. 430. (*d*) Het. 57. (*e*) 13 Eliz. cap. 10.
* Moor 593. Contra. 1 Mod. 205.

the making thereof, *and thereupon the accuſtomed yearly Rent or more ſhall be reſerved and paiable during the term ſhall be void.*

Upon this Statute it hath been obſerved, that a Leaſe may commence from the making thereof, whereas by the enabling Act 32 *H.* 8. it might commence from the *day* of the making as well as from the making, *&c.* likewiſe that the word *Suffered* (*f*) was put in to prevent any Alienation by Fine and non-claim, for if he doth not Claim he *ſuffers* it to paſs.

Leaſes made purſuant to this Act, muſt likewiſe have the ſame reſtrictions as required by the Act 32 *H.* 8. but they muſt be confirmed by thoſe who by Law are to confirm the ſame.

This Statute (*g*) hath been conſtrued liberally to prevent all Evaſions, for whereas it ſaith, that Leaſes made by *Maſters and Fellows of Colleges*, other then for twenty one Years ſhall be void, theſe words ſhall comprehend all other names of Corporation, as *Warden and Fellows*, *Warden and Schollars*, and alſo Colleges which are Temporal, and for the advancement of ſome Arts and Sciences, as Colleges which are Eccleſiaſtical or mixt.

So where it mentions Leaſes to be made by *Deans and Chapters* (*h*), thoſe words extend to a Chapter where there is no Dean.

By a Statute made in the very next Year (*i*), the power of making Leaſes was a little enlarged, for whereas by the Act 13 *Eliz. Parſons and Vicars* could make Leaſes only for twenty one Years; now by this other Statute they might Leaſe for forty Years, but this muſt be of Houſes in *Corporations*, *Cities*, *Burroughs*, *or Market-Towns*, *or the Subburbs thereof*, *and grounds belonging to the ſame*, ſo as they are not the Dwelling-houſes of the Parſons themſelves, nor have above ten Acres of Ground belonging to them.

But theſe Leaſes muſt not be made *in Reverſion*, nor without reſerving the accuſtomed yearly Rent, nor for a longer term than for forty Years; and there muſt be a Covenant to charge the Leſſees with Repairs, there muſt be no alienating ſuch Houſes in Fee unleſs Lands of as good yearly value be immediately purchaſed and ſettled on the Church in lieu thereof.

Therefore where the Dean and Chapter of *Pauls* (*k*) made a Leaſe of a Houſe in *London* for forty Years, which was in Leaſe for ten Years to another at that time, this was held void, becauſe it was a Leaſe in Reverſion, and ſo within the

(*f*) 1 Roll. Rep. 171. 11 Coke 66. (*g*) 11 Rep. 76. (*h*) 1 Mod. 205. (*i*) 14 Eliz. cap. 11. (*k*) Cro. Eliz. 564.

very words of the Act, which is a general Law, and need not be pleaded.

So a Leaſe made of a Houſe in a Market-Town (*l*) for twenty one Years only, to commence from *Michaelmas* after the date thereof, there being two years of a former Leaſe not expired, this was held to be a Leaſe in Reverſion, and ſo void within this Statute, tho' confirmed, becauſe it did not commence on the *day* it was made.

Now if a Parſon who is enabled by this Statute to make a Leaſe for forty Years, doth demiſe a Houſe for twenty Years, and eight Years afterwards he makes another Leaſe of the ſame Houſe, and to the ſame Perſon for twenty Years more, this is no concurrent Leaſe, becauſe the acceptance of the ſecond Leaſe by the Leſſee hath made his firſt Leaſe void.

And after all, Sir *Simon Degg* tells us, that it hath been a Queſtion whether a Parſon can make any manner of Leaſe to bind his Succeſſor (*m*), becauſe by a Statute made in the very ſame Year of the Queen, 'tis enacted, that Leaſes made by *Parſons and Vicars* ſhall continue no longer then they ſhall be reſident, and ſerve the cure *without abſence above eighty days in any one Year*.

This Queſtion did ariſe upon a very notable conſtruction of thoſe words, (*viz.*) That every Leaſe made by a Parſon ſhould continue no longer *then* 80 *days after his death*, and then to be void, becauſe he had been abſent ſo long from his Cure, and this is called an equitable expoſition of the Statute, it being made for the advancement of Religion, and to avoid Dilapidations; and we have a Report from *Juſtice Croke* (*n*) of a Judgment in point.

But Serjeant *Moor* (*o*) who Reports the ſame Caſe, tells us, the Judges were divided in Opinion upon this matter, but one would wonder what ſhould occaſion ſuch a Diviſion, 'tis true a dead Parſon can be no longer Reſident upon his Benefice, but certainly the *Reſidence* intended by the Statute muſt be ſuch which enables him to ſerve the Cure, and that can never be intended of a dead Man, neither muſt he be abſent above eighty days in one Year, but when he is dead he muſt be abſent for ever, ſo that *Death* cannot in propriety of Speech be called *abſence*, for a Man cannot be ſaid to be abſent who is not in being, it muſt be a voluntary abſence whilſt the Parſon is living and might return; and for this reaſon it has been (*p*) held, that if he is ſuſpended from his Cure for eighty

(*l*) 1 Vent. 244. 2 Lev. 61. (*m*) 13 Eliz. cap. 20. (*n*) Cro. Eliz. 123.
(*o*) Moor 270 (*p*) Moor 448. 6 Rep. 21.

days

days, this doth not make his Leaſe void, becauſe his abſence was not voluntary.

In 24 *Car.* 2. (*q*) the ſame point came in debate again, and the whole Court agreed, that death could never be intended to make a Parſon non-reſident, ſo as to avoid any Leaſe which he had made.

Beſides, the Statute inflicts the forfeiture of a Years Profit of the benefice of that Incumbent, who ſhall abſent himſelf eighty days to be diſtributed by the Ordinary amongſt the Poor of the Pariſh, *&c.* which ſhews that the Law-makers intended to puniſh a living, and not a dead Man, for ſuch cannot looſe a years Profits of his Benefice.

This is farther explained by a Statute made five Years afterwards, (*viz.*) *Anno* 18 *Eliz. cap.* 11. which provides, that if an Incumbent commits any Offence by which he ought to looſe a years Profit of his Benefice then within two Months after Sentence and requeſt made by the Church-wardens, *&c.* the Ordinary ſhall grant a Sequeſtration to ſuch Profits to any Inhabitant of the place, and if he ſhould make default in collecting it, then every Pariſhioner may retain his own Tithes.

There is another Queſtion, whether Leaſes (*r*) made by Parſons ſhall be void *ab initio* after eighty days abſence, *&c.* or only from the time of ſuch abſence; but the negative words in the Statute ſeem to reſolve this doubt, (*viz.*) That the Leaſe ſhall endure *no longer* then the Incumbent ſhall be Reſident, which imply that it ſhall endure ſo long, and an Action of Covenant may be brought (*ſ*) for any breach within that time.

Beſides the Statute is, that upon eighty days abſence the Leaſe ſhall *ceaſe*, which ſhews that it was in being till the Parſon abſented for that time, otherwiſe it could not then *ceaſe*.

And in pleading this matter it muſt be, that he abſented himſelf eighty days *& ultra* (*t*) and that it was *voluntary Cro. Eliz.* 100. and care muſt likewiſe be taken that the Statute is truly recited (*u*).

Upon the whole matter, a Parſon may make a Leaſe to bind his Succeſſor, ſo as ſuch Leaſe is confirmed by Patron and Ordinary, and if he ſhould afterwards be deprived, the Leaſe is good.

(*q*) 2 Lev. 61. 1 Vent. 244. (*r*) Dyer 372, b. (*ſ*) Cro. Eliz. 78. (*t*) Cro. Eliz. 88. 1 Roll. Rep. 403. 3 Bulſt. 201. (*u*) Cro. Eliz. 490.

But

But the Law ſeems to have left it in his power to avoid ſuch Leaſe in his life-time by a voluntary abſence from his Cure for eighty days, and a Confirmation will not help it, becauſe that cannot make a Leaſe good which the Law hath made void, and tho' there ſhould be a Covenant in ſuch Leaſe that the Parſon would not abſent himſelf, &c. and a Bond for performance of Covenants, yet they are both void: But if the Covenant is that the Leſſee ſhall enjoy the Lands for a certain number of Years, if the *Parſon ſhall ſo long live*, he doth thereby take upon himſelf not to do any Act which ſhall determine the Leaſe, and therefore if he reſigns or is abſent for eighty days, an Action of Covenant lies againſt him (*x*), but if this Clauſe is added, *viz. or as long as he continue Parſon there*, in ſuch caſe he may reſign.

Concurrent Leaſes.] But an invention was found out to prejudice the Succeſſor, notwithſtanding this reſtrictive Act, 13 *Eliz.* for Parſons and Vicars would make Leaſes for twenty one Years or three Lives long before the Expiration of a former term (*y*), and therefore another Statute was made to prevent this miſchief reciting the Statute 13 *Eliz.* which declares all Leaſes void which are made by *Maſters and Fellows of Colleges, Deans and Chapters, Maſters and Guardians of Hoſpitals, Parſons and Vicars, or any other having Eccleſiaſtical Livings, or Lands, Tithes, Tenements, or Hereditaments, parcel of their Poſſeſſions, or any other Spiritual Promotion other then for twenty one Years or three Lives, where any former Leaſe was in being, and not to be expired, ſurrendered or ended within three Years next after the making the new Leaſe.*

The general words of this Statute, *viz. or any other having Eccleſiaſtical Promotion* (*z*) do not comprehend Biſhops, becauſe the particular enumeration of Perſons of an inferiour Degree, ſheweth who are meant, and therefore thoſe general words ſhall not draw in a Superiour order of Men.

By the Statute 32 *H.* 8. (*a*) Biſhops may make concurrent Leaſes *without Confirmation* where the old Leaſe is to expire *within a Year* after the making the new one, and they may make ſuch Leaſes *with Confirmation*, where more then three Years of the old Leaſe are not expired at that time, but they cannot make a concurrent Leaſe *for lives* where there is a former Leaſe *for Years* in being *nec e converſo*, but other Eccleſiaſtical Perſons cannot make ſuch Leaſes unleſs the former term is to expire within three Years, and if ſo, they may do it without Confirmation.

(*x*) 1 Brownl. 125. (*y*) 18 Eliz. cap. 11. (*z*) Gouldſ. 171. (*a*) 5 Rep. 2 Cro. Eliz 141. Moor 253.

Con-

Of confirming, concurrent and other Leaſes.

Confirmation of a Leaſe may be compared to an attornment of Tenant for Life or Years to him in the Reverſion, for it ſhews an aſſent to a new Lord, only with this difference, that Confirmation is ſomething more, for that is an aſſent coupled with an Intereſt, becauſe the Patron and Ordinary have a right in the thing confirmed, one hath *jus conferendi*, and both together may charge the Glebe when the Church is not full, they may likewiſe Confirm the whole or part, which cannot be done by Tenant for life, in order to perfect the Grant, for he cannot aſſent to part of the Eſtate granted, but his attornment muſt enure to the whole.

There is an *extra* judicial Opinion in *Moor* (*b*), *viz.* that if a Leaſe is confirmed, and then another Leaſe is made of the ſame Land, and by the ſame Perſon, to commence after the determination of the firſt Leaſe, and then a third Leaſe is made to commence preſently, and this is confirmed before the ſecond Leaſe, yet that ſhall not take place, for the confirmation paſſes no intereſt, it only makes the Eſtate durable and effectual.

Neither will a Confirmation make a Leaſe good which wants any of the Qualifications required by the Statute 32 *H.* 8. both in reſpect to the continuance of the Eſtate, and the Rent, becauſe the reſtraining Statutes, *viz.* 1 & 13 *Eliz.* make all ſuch Leaſes void, ſo that Confirmation ſeems only neceſſary where the thing demiſed is not all in poſſeſſion, or that the old Leaſe is not expired, *&c.*

But ſince the Policy of the Law hath made Confirmation neceſſary to perfect ſome Leaſes made by Eccleſiaſtical Perſons, therefore where that is to be done the Law requires it ſhould be by theſe Perſons following.

(1.) Leaſes made by the Archbiſhops and Biſhops muſt be confirmed by the Dean and Chapter.

They may likewiſe be confirmed by Deans and Chapters (*c*) where there are two, and the greateſt part *capitulariter congregati* ſhall conclude the reſt.

A meer *commendatory Dean* (*d*) cannot confirm a Leaſe, but if he is elected Biſhop, and before Conſecration doth obtain a Diſpenſation to hold his Deanry in *Commendam*, ſuch Dean may Confirm.

If the Dean and Chapter (*e*) confirm any Leaſe made by a Biſhop before 'tis enrolled, ſuch Confirmation is good.

(*b*) Moor 56. (*c*) 1 Roll. Abr. 477. (*d*) Palm. 460. (*e*) 1 Roll. Abr. 478.

(2.) Leaſes

(2.) Leaſes made by a *Prebendary* after he is inſtalled, muſt be confirmed by the *Biſhop, Dean and Chapter* (*f*), unleſs where the *Queen* is Patron, and then She and the *Dean and Chapter* are to Confirm, *&c.* and where the *Biſhop* (*g*) is Patron of the Prebendary, his Confirmation alone without the *Dean and Chapter* is not good but only againſt himſelf, becauſe the Patronage is parcel of the poſſeſſions of the Biſhopprick, (*h*) but where the Archbiſhop is Patron of a Prebendary he may confirm his Leaſe without the Dean and Chapter.

So where a Prebend lying in one Dioceſs (*i*) is united or annexed to a Prebend in another Dioceſs, a Leaſe by the Prebendary is good if confirmed by the Biſhop of that Dioceſs whereof he is a Prebendary, and not by the Biſhop where the Prebend lies, for tho' the Prebendary is inducted by him, yet he ows Canonical Obedience to the other Biſhop, of whoſe Cathedral he is a *Prebendary*.

A *Prebendary* made a Leaſe for 70 *years* (*k*), and the Biſhop, Dean and Chapter confirmed *dimiſſionem pred. for* 50 *years*, *& non ultra*, yet this Confirmation goes to the *whole term*, for the intereſt was veſted in the *Prebendary*, and the Confirmation was only an Evidence of the conſent of the Dean and Chapter to the Leaſe, and not to the Intereſt which paſſed by it, and therefore cannot be apportioned, but if they had confirmed *the Land* for 50 years, it had been good for ſo much and no more.

By which we may obſerve a difference where the Confirmation relates to the Eſtate, as it did in this caſe by the words *dimiſſionem pred.*, and where it relates to the *Land* it ſelf, for in the one caſe it enures to the whole Eſtate, but in the other only to the term limited by the Confirmation and no more.

A Prebend was uſually lett excepting the *Crab-trees* (*l*), the *Prebendary* made a *Leaſe* of it without this exception, and it was adjudged that it was void for that very reaſon, for the *Crab-trees* being not excepted, there was more let by this new *Leaſe* then what had been uſually demiſed, which is contrary to the Statute 13 *Eliz. cap.* 10. ſo that the *Succeſſor* was deprived of the benefit of thoſe Trees, and of the Soil.

One would think, that the omiſſion of ſuch an unuſual exception ſhould not make the *Leaſe* void, for it ſeems not to be within the intent or meaning of the *Law*, ſince that was made to prevent Dilapidations, and impoveriſhing the Succeſſor, who probably might have very little benefit by *Crab-Trees*.

(*f*) 1 Roll. Abr. 481. (*g*) 1 Roll. Abr. 479, 481. (*h*) 3 Bulſt. 190. (*i*) Cro. Eliz. 587. 1 Roll. Abr 479. ibid. 75. (*k*) Cro. Eliz. 447. 5 Rep. 8. 1 And. 47. (*l*) 2 Cro. 458. 3 Bulſt 290 iedm.

But

But Mr. *Bulſtrode*, who reports the ſame Caſe tell us, that the Leaſe was uſually made of this Prebend, excepting *Oak*, *Aſh* and *Crab-trees*, and there the omiſſion of ſuch an exception might be prejudicial to the Succeſſor for want of the Lops of ſuch Trees.

(3.) Leaſes made by Deans muſt be confirmed by the Biſhop and Chapter, unleſs in the caſe of the (y) Dean of *Wells*, and he may make Leaſes without the confirmation of the Biſhop, and only with the aſſent of the Chapter, for the old Deanry was ſurrendred which was confirmed by Parliament, and a new Deanry erected, and the nomination of the new Dean was given to the King and his Succeſſors, and power to grant his Poſſeſſions as the old Deans had uſually done, and becauſe they had made grants thereof without confirmation of the Biſhop, therefore the new Deans might do ſo too.

The Leaſe of a Dean (z) who is Sole-ſeiſed, may be confirmed by the Chapter.

(4.) Leaſes made by Archdeacons muſt be confirmed by the (a) Biſhop, Dean and Chapter; but where the Biſhop is Patron it may be confirmed by him alone, *Cro. Eliz.* 430.

(5.) Leaſes made by Parſons and Vicars after induction, muſt be confirmed by Patron and Ordinary, but the confirmation of (b) the Patron ſhall bind, according to the Eſtate he hath; for if he is Tenant in Tail his confirmation will not make the Leaſe good, without barring the Entail, or diſcontinuing that Eſtate, for otherwiſe the Iſſue in Tail will avoid it. If three Coparceners are Patrons, the Leaſe muſt be confirmed by them all.

The next Avoidance was granted, then the Incumbent made (c) a Leaſe for years, which was confirmed by the Patron and Ordinary, and the Church being void, the grantee of the next avoidance Preſented, and his Clerk was inducted, and avoided this Leaſe during his time, then he died, and the Patron who had confirmed the Leaſe preſented another Clerk, and it was adjudged that he ſhould hold it diſcharged of the Leaſe, becauſe the whole term was evicted by his Predeceſſor.

'Tis generally agreed, that the Parſon who makes (d) the Leaſe muſt be perfect Incumbent, either upon a Preſentation or Collation, for if one enter and poſſeſſeth the Glebe without any manner of Right, and then makes a Leaſe, which is confirmed, yet 'tis void.

(y) 1 Rol. Abr. 478. Dyer 273. (z) 1 Rol. Abr. 478. (a) 1 Rol. Abr. 478. Dyer 259. (b) 1 Rol. Abr. 361. (c) Cro. Car. 582. Jones 454. (d) 1 Rol. Abr. 480.

Therefore,

Therefore, where the Incumbency is by Uſurpation, and the Parſon makes a Leaſe, which is confirmed by the Ordinary and the Uſurper, and then the true Patron recovers his right, he ſhall defeat ſuch Leaſe.

But 'tis not neceſſary that the very (*e*) Patron or Ordinary who had an intereſt at the time of the Leaſe made ſhould confirm a Leaſe, for 'tis ſufficient if done by the ſucceeding Patron and Ordinary.

It may ſeem ſtrange, that if (*f*) a Layman had been inducted to a Benefice before the Statute 13 *Eliz.* and had made a Leaſe, which was confirmed by the Patron and Ordinary, and then had been deprived, that this Leaſe ſhould be good, but it was ſo, becauſe he was Parſon *de facto*.

If Husband and Wife are Patrons, in right of the Wife, and they confirm (*g*) a Leaſe made by the Parſon, this ſhall bind only during the Coverture, for the act of the Woman was void.

But there is a difference where any Eccleſiaſtical Perſon makes a Leaſe for years and for life, for if 'tis for years, ſuch an Eſtate in its own nature is ſeveral, and may therefore be confirmed for part, but when 'tis for life 'tis entire, and therefore a confirmation but for a day is good for ever, that is, during the life of the Perſon whoſe Eſtate is confirmed.

And as the Eſtate of the Perſon confirming is to be conſidered, (as before hath been obſerved) ſo there ought to be ſome regard to the time when 'tis (*h*) confirmed; for 'tis abſur'd to ſay, as ſome have done, that a Leaſe may be confirmed before 'tis made, or even after 'tis made, and before the Leſſee hath any intereſt veſted in him by ſuch Leaſe; As for inſtance,

If a Leaſe is made to *B.* for years, and afterwards the Reverſion is granted to *C.* for years, and (*i*) the Dean and Chapter confirms the laſt Leaſe, ſome have held that this is good, tho' *C.* had no Eſtate before the Attornment, but it ſeems abſur'd to ſay, that a Man can confirm or give his aſſent to a thing that is not.

Where the acceptance of Rent by the Succeſſor will make a Voidable Leaſe good.

The acceptance of a Rent reſerved upon a Leaſe which is void in it ſelf without Entry or other Ceremony to make it ſo, will not affirm ſuch Leaſe.

And as to this matter, the Law diſtinguiſhes between Leaſes which are made by thoſe who have an abſolute, and others who have (*k*) a qualified Fee; the firſt are Biſhops, Deans and

(*e*) 5 Rep. 15. Cro. Car. 376. (*f*) 1 Rol. Abr. 476. (*g*) 1 Rol. Abr. 479. (*h*) Owen 33. (*i*) 4 Leon. 23. (*k*) 2 Cro. 178.

and Chapters, and if they make voidable Leaſes not warranted by the Statutes, and the Succeſſor accepts the Rent, he affirms the ſame during his time, whether the Leaſe is for lives or years.

But if a Parſon or Vicar who hath only a qualified Fee, makes a Leaſe for years, not warranted by the aforeſaid Statutes, reſerving Rent, and dies, in ſuch caſe an acceptance of that Rent by the Succeſſor will not make the Leaſe good, becauſe it was void without Entry, but if it had been (*l*) a Leaſe for lives, and the Succeſſor had accepted the Rent before he made any Entry to void it, this ſhall bind him for his time, becauſe the Leaſe being for lives, which is a Freehold, cannot be avoided before Entry.

If a Biſhop makes a Leaſe of a Manner, *&c.* rendring Rent, but not warranted by the Statutes and dies, and his (*m*) Succeſſor commands his Servant to receive the Rent, which he doth, and pays it over to the Biſhop, this is a good acceptance of the Rent to confirm the Leaſe, becauſe he ought to take notice at his Peril what Leaſes his Predeceſſor made.

And as acceptance of the Rent will affirm a voidable Leaſe, ſo will diſtreining for it, after the death of the Predeceſſor, or bringing an Action of Waſte againſt the Leſſee.

But the acceptance of Rent by the Head of a Corporation aggregate due on (*n*) a voidable Leaſe, will not affirm it; as if a Preſident of a College accept ſuch Rent, this ſhall not continue the Leaſe during his life, becauſe he alone cannot diveſt the Fellows of their right.

'Tis generally true, that if (*o*) a Leaſe is made not warranted by the Statutes, 'tis void againſt the Succeſſor, but not againſt him who made it, and the reaſon is, becauſe thoſe Laws were made for the benefit of the Succeſſor, and not to aſſiſt the Poſſeſſors, but this muſt be underſtood of Leaſes made by a (*p*) Biſhop, Dean, Parſon, or any other Sole Eccleſiaſtical Corporation, for if made by a Corporation aggregate, then 'tis void *ab initio*, and this was my Lord Chief Juſtice *Hales* opinion.

Laſtly, There are two ways of making a voidable Leaſe actually void, *viz.* by Entry or Claim.

The Entry muſt be where the Leaſe is made of things Manurable or Corporeal, as Lands, *&c.* and it may be done by any (*q*) Perſon deputed for that purpoſe, under Hand and Seal, and it cannot be done by a Bailiff *ex officio*.

(*l*) Het. 83. (*m*) 1 Rol. Abr. 476. (*n*) 11 Rep. 79. 1 Rol. Rep. 100. (*o*) Moor 875. 2 Brownl. 158. 1 Leon. 306. (*p*) Hardres 326. (*q*) Moor 52. Dyer 221. *b*. 1 Rol. Abr. 514.

By

By claim, when the Leaſe for years is made, reſerving Rent upon condition to be void upon non payment, here you muſt claim the Rent on the day to avoid the Leaſe.

I ſhall now compare theſe ſeveral Statutes together, and ſhew wherein they agree, and where not.

'Tis plain, they are all made in *pari Materiâ*, and that there is ſuch a connexion between them, that they have been conſtrued to explain each other.

The firſt Statute, *viz. Anno* 32 *H.* 8. is not recited either by 1 or 13 *Eliz.* yet a Leaſe is not warranted by either of thoſe laſt Acts, unleſs it hath the qualifications and reſtrictions required by the Statute 32 *Hen.* 8.

'Tis expreſsly required by 32 *Hen.* 8. that upon every Leaſe there muſt be ſo much yearly Rent reſerved, or more, as hath been uſually paid within 20 years before the making the new Leaſe; the Statutes 1 *&* 13 *Eliz.* are, that the accuſtomed yearly Rent or more ſhall be reſerved, and herein they all ſeem to agree, for the Senſe is the ſame, tho' the Words are a little varied.

But by the Statute 32 *Hen.* 8. ſuch Leaſe muſt not be *without impeachment of Waſte*, which is not required either by 1 or 13 *Eliz.* yet ſince Eccleſiaſtical Perſons are reſtrained by thoſe Statutes from making long Leaſes, they are by the Equity thereof reſtrained alſo from making Leaſes diſpuniſhable of Waſte.

The Statute 13 *Eliz. cap.* 10. makes no alteration of the 32 *Hen.* 8. but leaves it as a Pattern for Eccleſiaſtical Corporations aggregate to make Leaſes; ſuch Corporations being not within the Statute 32 *Hen.* 8. but only Sole Corporations, as Biſhops, *&c.*

The Statute 14 *Eliz. cap.* 11. is an Appendix to the 13th. which makes void all Eſtates granted by Parſons, *&c.* of parcel of their Poſſeſſions, other than for Twenty one Years or three Lives, but it inlarges that Act as to Leaſes of Houſes in Cities and Corporate Towns, from Twenty one to Forty Years, ſo as ſuch Leaſes are not made in Reverſion, it makes no alteration of the Statute 1 *Eliz.* and therefore gives no power to Biſhops to make any ſuch Leaſes in Cities and Town Corporate, other than they might have done by that Statute.

The Statute 18 *Eliz. cap.* 11. which prohibits Leaſes in general to be made in Reverſion where any Leaſe is in being, and not to expire with three Years after the making the new Leaſe, hath no relation either to the Statute 1 or 14 *Eliz.* not to the firſt, becauſe this Act begins with the inferior orders of Men, and therefore doth not extend to Biſhops, nor

to

to the 14th *Eliz.* becauſe 'tis not recited in it, and therefore that Paragraph which makes void all Bonds and Covenants for renewing or making any Leaſes contrary to the 13th or 18th *Eliz.* doth not extend to Bonds or Covenants for making Leaſes of Houſes in Cities, *&c.*

What Leaſes a Parſon may make, and for how long.

In former times there was a difference made where a Parſon Leaſed his Tythes to a Stranger, and where he Demiſed the ſame to a Pariſhoner; for if to a Stranger it could not be without Deed, tho' but for a Year, becauſe Tythes cannont paſs in Intereſt, but by Deed; but a Parol. Agreement with a Pariſhoner to be diſcharged of Tythes was good by way of Reteiner, and ſo 'tis now for a Year, (*a*) but no longer.

But an agreement in conſideration of Money to be diſcharged of Tythes, during the Joynt Lives of (*b*) the Parſon and Pariſhoner is not good without Deed, for it founded in the (*c*) nature of a Leaſe, and as ſome held the Law then to be, a Parſon could Leaſe but for a Year.

But Juſtice *Yelverton* who reports this Caſe tells us, that he might Leaſe for Years, for ſuch Leaſe is in nature of a Perſonal Compoſition between the Parſon and the Owner of the Land, and good by way of Reteiner, and if the Parſon afterwards Sues for the Tythes a Prohibition will lie upon ſuggeſting this Contract, for the (*d*) Spiritual Courts cannot take notice of Contracts, and with this the latter Authorities agree, *viz.* that a Contract for Years is good.

So that a Parſon may make a Leaſe for three Years, and from and after the expiration of that Term for three Years longer (*e*), and ſo from three Years to three Years during his Life, and this is a good Leaſe for twelve Years.

So if he make a Leaſe for one Year, and ſo from Year to Year, as long as he continues Parſon, *&c.* this is a good Leaſe for two Years, and afterwards 'tis an Eſtate at will.

Leaſes by Colleges.] By a Statute made 18 *Eliz.* 'tis Enacted, That in all Leaſes made by Colleges in the Univerſities, and by *Winton* and *Eaton* College, *the Third Part of the Rent ſhall be reſerved in Grain, to be delivered to them Yearly at a certain Day* (f), *after the Rate of* 6 s. *&* 8 d. *for a Quarter of Wheat, and* 5 s. *for a Quarter of Malt or under, and for default thereof that the Leſſee ſhall pay ſo much Money as Corn of that kind ſhall be Sold by the Quarter, in the ſeveral Markets, in the reſpec-*

(*a*) Godb. 374. 2 Rol. Abr. 63. (*b*) Cro. Eliz. 188. 2 Leon. 29. Owen 103. (*c*) 2 Cro. 137, 668. Yel. 94. (*d*) Raym. 14. (*e*) 1 Rol. Abr. 850. 1 Rol. Rep. 287. 3 Bulſt. 158. Co. Lit. 45. (f) 18 Eliz. cap. 6.

tive places of Oxford, Cambridge, Winton *and* Eaton, *the very Market Day next before the Rent was Due, and all Leaſes, Bonds and Aſſurances to the contrary ſhall be Void.*

But this Act is not to extend to Leaſes made by St. John's College *in* Oxon, *of their Manner of* Fifeild.

Lecturer. See *Preaching.*

THE Office of a Miniſter may be Executed by one who hath no Title to a Benefice, and that is, by a *Lecturer*, and 'tis ſufficient if ſuch Perſon is in Deacons Order.

But the Law requires that ſuch *Lecturer* ſhould not only have the Conſent of him by whom he is Employed, but likewiſe the Approbation and Admiſſion of the Ordinary, and he muſt likewiſe at that time of his Admiſſion, Subſcribe the Declaration and Acknowledgment required by the Statute 14 *Car.* 2. *cap.* 4. and this he muſt do in the preſence of the Biſhop, and get him to certifie it under his Hand and Seal, which Certificate and Declaration he muſt Read within three Months following, in the Pariſh Church where he is to Officiate, on ſome Sunday, in the time of Divine Service, and in the preſence of the Congregation, and if he neglects he looſes his Place.

He muſt likewiſe have a Licenſe from the Biſhop, and muſt Read the 39 Articles in his Preſence, and Declare his unfeigned Aſſent to the ſame, and if he Preacheth in the Week Days he muſt Read the Common Prayer for the Day when firſt he Preacheth, and Declare his Aſſent to that Book, and ſhall do the ſame the firſt *Lecture* Day in every Month, ſo long as he continues *Lecturer*, if he neglects or refuſes he is diſabled to Preach till he Conformeth.

And if he ſhall Preach before he Conforms, he ſhall be Committed for three Months without Bail, by a Warrant of two Juſtices of Peace, the Offence being certified to them by the Ordinary.

Libel.

THIS is a Declaration or Charge Drawn up in Writing in any Action at the Civil Law, to which the Defendant is obliged to Anſwer, and therefore 'tis reaſonable he ſhould have a Copy of it, which hath often been Denied by Eccleſiaſtical Judges; and for this Cauſe the Statute 2 *Hen.* 5. *cap.* 3. was made, by which 'tis Enacted, That *the Copy of the Libel ſhall be Granted to the Party*, and for this purpoſe we have a Writ in the *Regiſter* framed upon that very Statute, Di-

rected

rected to the *Dean of the Arches* (*g*) or his Commiſſary, to deliver a Copy of the *Libel* to the Defendant *Sub pœna Centum Librarum.*

But the uſual Courſe in ſuch Caſe is, to move the Courts at *Weſtminſter* for a Prohibition (*h*); and *Fitzherbert* tells us, the Party may have an Action on the Caſe againſt the Judge who refuſes it.

Liturgy.

WHEN the Chriſtians were no longer in fear of the Violence and Perſecution of the Heathens, and in that Age when the Church came to be Settled, that is, from the time of *Conſtantine* to that of St. *Auſtin*, we find there was a *Liturgy* in the *Eaſtern* Church.

The firſt *Cyrill* of *Jeruſalem* mentions ſome Parts of an ancient *Liturgy* uſed in that Place, both in reſpect to the form of Baptiſm, and the Celebration of the Euchariſt.

St. *Baſil* compoſed a *Liturgy* himſelf, which is to be ſeen in the *Bibliotheca Patrum*, and in his Book *de Spiritu Sancto* (*i*), and he tells us how the Service of the Church was directed by Rules and Rubricks.

In St. *Chriſoſtome*'s time (*k*), *Omnes unam eandemq; precem concipiebant*, and this was not only a Publick Prayer, but a Publick Form; for in that Collection of his Works ſet forth by Sir *Henry Savile*, we find a *Liturgy* of his own making, which was Tranſlated out of the *Syriack* by *Maſius*, and uſed generally throughout all the *Greek Churches.*

Now, if it ſhould be Granted that premeditated Prayers are not required by God in our Private Addreſſes to Him, yet from thoſe Inſtances already mentioned, ſuch Prayers were always held neceſſary in the Publick Services of the Church, and this farther appears by the Form preſcribed by our Saviour Himſelf, who when we Pray commanded us to ſay, * *Our Father*, &c. and † St. *Matthew* tells us, that he went away again and Prayed the Third time, ſaying the *ſame Words.*

The Apoſtolical Canons mention ſome Set Forms of Prayer both before and after the Communion; and St. *Baſil* and St. *Chriſoſtome* beforementioned did not only compoſe Set Forms themſelves, but they aſcribe Set Liturgies to be compoſed by St. *Marke* and St. *James*; and the Adverſaries to ſuch Forms have no other plauſible Pretence to deny theſe Authorities, but by alledging theſe *Liturgies* to be Suppoſitious, which is an

(*g*) Rey. 58. (*h*) Moor 917. *F. N. B.* 43. (*i*) Baſil *de Sancto Spiritu* cap. 27. (*k*) Homil. 18. * Luke 11. 2. † Mat. 26. 39, 42.

Anſwer that may ſerve upon any occaſion to evade an Argument, which cannot otherwiſe be Anſwered.

St. *Ambroſe* and *Proſper* (*a*) tells us, there were Set Forms of Prayers uſed in the Church in their time, and they give the Reaſon for it, *ne in diverſum intellectum noſtro Evagemur arbitrio*, and St. *Hillary* hath this Expreſſion on the 66th *Pſalm*, *viz.* Let thoſe without the Church hear the Voice of the People *Praying* within, now the word *Praying of the People* muſt ſignify ſomething more than the bare Suffrage *Amen*, it muſt import their joynt concurrence in the actual performance of the whole Duty, which cannot be done but where the Prayers are in a Set Form.

And theſe are the Prayers which (*b*) *Iſidore* tells us were uſed in the ancient Congregations of the Chriſtians; and 'tis moſt certain that ſuch were in uſe in that great Apoſtate *Julian's* time, for *Nazianzen* (*c*) informs us, that he endeavoured to Eſtabliſh the Heathen Ceremonies in imitation of the Chriſtian Services, by appointing not only certain times but *Set Forms of Prayer*.

'Tis true, many of the ancient Liturgies were Deſtroyed by the Perſecuting Heathens, yet ſome Fragments of them ſtill remain in the Writings of the Fathers, and are ſuch which are uſed in our Church at this Day, as the words before and after the Conſecration of the Sacrament are to be found in * St. *Ambroſe*, the Queſtion demanded of the Godfathers in the Sacrament of Baptiſm, *viz.* *Whether they do in the Name of the Infant Renounce the Devil and all his Works, and the Pomps and Vanities of this Wicked World*, are to be found in the ſame St. *Ambroſe*; and in † *Tertullian*, the *Gloria Patri*, of which more hereafter is in *Sozomen*, and the Supplement to that Doxologie, *viz.* *As it was in the beginning*, &c. is to be found in ** *Irenæus*.

In the Sacrament of the Lord's-Supper, the words Pronounced by the Prieſt, *viz.* *Lift up your Hearts*, and the Anſwer, *We lift them up, 'tis meet and right for us ſo to do*, are to be found in St. *Auſtin* †† and St. *Chryſoſtome*, and ſo are theſe words, *viz.* *The Lord be with you, and with thy Spirit*; and *laſtly*, * *Iſidore* mentions the uſual Concluſion of all our Collects, *viz.* *thro' Jeſus Chriſt our Lord*, &c.

In the *Weſtern* Church St. *Cyprian* tells us, there was a *Liturgy*, *viz.* in the Church of *Africa*, which is uſually accounted amongſt the Churches of the *Weſt*; and we find ſome Peices

(*a*) Ambr. in 1 Tim. 2. *Proſp. de Vocat.* Gent. Lib. 1. cap. 12. (*b*) Iſid. Lib. 1. cap. 19. (*c*) Orat. 3. *verſus* Julian. * De Sacrum Lib. 4. cap. 5. † Lib. 1. cap. 2. De Corn. Mil. cap. 3. ** Lib. 1. cap. 1. †† Auguſt. de bono perſever. cap. 13. 1 Homil. de Pentecoſt. * Lib. 1. Ep. 1222.

of ſuch Liturgies in the ſame †† St. *Auſtin*, and not only approved by him who was himſelf Biſhop of that See 35 Years, but by all the Fathers of that Church aſſembled in a Synod, as it appears by the Canons (*y*) which they made, and which are mentioned both by *Balſamon* and *Zonarus*, *viz.* That Prayers be performed by all, and not any to be ſaid in publick; but only ſuch which have been compoſed by wiſe and underſtanding Men, leaſt any thing ſhould be vented againſt the Faith, either through Ignorance or want of Meditation.

Tertullian mentions a Liturgy uſed in *Rome*, which was probably begun by St. *Peter*, for it bares his name, and *Platina* tells us, that ſeveral additions were made to it in ſucceeding Ages, as by *James Biſhop of Jeruſalem*, and by St. *Baſill* in his time, and in ſome things this Author is very particular, as that *Celeſtine* added the *Introitus*, *Gregory* added the *Kyrie Eleiſon*, *Teleſephorus* the *Gloria in Excelſis*, *Xiſtus* the firſt added *Holy, Holy, Holy Lord God of Hoſts*, which is called the *Triſagion*, *Gelaſius* the Collects, St. *Jerom* the Epiſtles and Goſpels.

The *Gloria patri*, which I have mentioned before, was not only appointed by the Council of *Nice* to encounter the *Arrian* Hereſie, but it was uſed long before that Council, even by the Apoſtles themſelves, who were commanded by their Maſter to baptize *in the name of the Father, &c.*

This is found in the writings of all thoſe ancient Fathers who lived near the time of the Apoſtles, as in *Clemens*, who was their Schollar, and in *Dionyſius* of *Alexandria*; but the following words which make up the whole form of the *Doxology*, *viz.* *As it was in the beginning*, &c. were not brought into the Church till the *Arrian* Hereſie began to ſpread, and this was about the time of the Council of *Nice*.

'Tis true, this began firſt in the Eaſtern Church, for which reaſon I have mentioned it before, and from thence it came to the Weſt, where Pope *Damaſus* was the firſt who appointed it to be uſed at the end of *David*'s Pſalms, for thoſe made up the greateſt part of the publick Liturgy of that Church.

The Churches of *France*, *Spain* and *England* had the like Liturgies, tho' not exactly the ſame.

'Tis true, we have no certain account what Rights or Forms were uſed here amongſt the Britains, but *Bede* in his Eccleſiaſtical Hiſtory tells us (*z*), that as ſoon as the Goſpel was planted here, there was a Liturgy formed out of the Rituals of the moſt flouriſhing Churches then in the World.

†† Epiſt. 156. (*y*) 12 Canon of Council of Mileviti. (*z*) Lib. 1. cap. 27.

For Pope *Gregory* adviſed St. *Auſtin* not to follow the *Roman* Office ſtrictly, but to take what he ſhould approve in any Church, and preſcribe the ſame to the *Engliſh*, which he did, and this Liturgy of St. *Auſtin* continued for ſome Ages till *Oſmund Biſhop of Sarum* finding that new Prayers and Offices abounded every where, reduced them all to one Form, and from thence it was called *ſecundum uſum Sarum*.

As to the Liturgy now uſed amongſt us, it was compoſed at the beginning of the Reformation, for the Offices of the Church before that time conſiſting in *Miſſals*, *Breviaries*, *Pſalteries*, *Graduals*, *Pontificals*, and every Religious Order, having peculiar rights obſerved amongſt themſelves, it was thought proper that the Worſhip of God ſhould be brought under a ſet Form, and moreover that nothing ſhould be changed meerly out of an affectation of Novelty, or becauſe it had been uſed in times of Popery, ſo as it had been practiſed in the Primitive Times, and ſuch things only were retained.

This Liturgy was confirmed by Act of Parliament *Anno* 1 *Ed.* 6. which was repealed by *Queen Mary*, but being reviewed in *Queen Elizabeth*'s Reign by ſome of the reformed Divines, and ſome ſmall variations made in it, and particularly in the Rubrick before the Common Service, it was eſtabliſhed again by Act of Parliament as we now have it.

Upon the whole matter as it would be a very indiſcreet thing to addreſs to a Prince in a ſudden Diſcourſe without any Premeditation of the Form; ſo 'tis more bold to petition God publickly in *extempory Prayers*, for if we would take the adviſe of the * wiſe Man, we ſhould *not be ſo raſh with our mouths when we go into the Houſe of God, becauſe he is in Heaven and we on Earth*; That is, his Majeſty is Sublime, and therefore not to be approached but with great Reverence, not raſhly petitioned by mortal Creatures.

No Argument can be deduced from the unconceived Prayers of the Apoſtles to evince the neceſſity of ſuch Prayers now, becauſe if at any time they prayed in that manner, it was by the extraordinary aſſiſtance of the Divine Spirit; but now that Cauſe is ceaſed, for no Man will pretend to be illuminated as they were; and as for that expreſſion in the Epiſtle to the *Romans*, (*a*) *viz. That the Spirit will help our Infirmities, and make interceſſion for us*, &c. the meaning is, that the Spirit will direct our Thoughts, which naturally incline to Evil, and will quicken our *inward* Deſires for the true performance of this Holy Duty; it doth not give us any extraordinary

* 5 Eccleſ. 1, 2. (*a*) Chap. 8. ver. 26.

help

help in our *outward* Expreſſions; nay ſo far from it that we find in the ſame Chapter, that the *external* effects attributed to the help of the Spirit are only groanings which cannot be uttered.

London *Clergy.*

THE maintenance of the ſecular Clergy in *London* before the Reformation (*b*) did chiefly conſiſt in voluntary Offerings, and *perſonal Tithes*, which is part of the Profits ariſing by the Labour, Art, Trade, or induſtry of the Inhabitants, but there being no *Law* to preſcribe the quantity or value of ſuch *perſonal Tithes*, they were eſteemed to be voluntary Oblations, and as ſuch they were received by the Clergy.

This is affirmed by Sir *Simon Degg*, but it ſeems to me to be a miſtake, for 'tis improbable that the *Law* ſhould ſettle a maintenance upon the Country Clergy, and leave thoſe in *London* to be ſupported by the voluntary Oblations of the People, eſpecially if we conſider that where the numbers are great there ought to be learned and diſcreet Miniſters to guide and inſtruct them, and ſuch cannot be had where there is not a ſufficient and regular maintenance to reward their Care and Pains.

Therefore the Clergy of *London* muſt have a fixed and ſettled Maintenance long before that time, which was 52 *Farthings* paid on Sundays for the predial Tithes of Houſes, and this proportioned according to the *annual* Rents, for I find, that when *Robert Niger* was Biſhop of *London*, which was *Anno* 19 *H.* 3. there was 14 *d.* out of every Noble or yearly Rent paid to the Clergy, 'tis true this was more then a tenth part, and therefore it could not be a *modus decimandi* as Sir *Simon Degg* imagines it to be, but it was a ſettled Maintenance for the Clergy there, and probably it was laid in this proportion on the Rent of Houſes as a retribution to the Clergy, for what might eaſily be withdrawn from them out of the perſonal gains of the People, which ought to be the tenth part, but when left to their voluntary Diſpoſition was ſeldom paid in that proportion, becauſe it was almoſt impoſſible to diſcover the certainty of their Gains.

I grant, that *Anno* 38 *Ed.* 3. *Serjeant Finchden* tells us, that in *many places in London* the Clergy had no other Tithes but Offerings (*c*), which implies, that in ſome places *there* they

(*b*) Degg. 256. (*c*) 38 Ed. 3. 13, 2.

had other Tithes, and my *Lord Coke* (*d*) many Years after him ſays, that Offerings and Obventions are the profits of the Clergy in *London*, and not in Corn or *any other Manner*.

We know 'tis not in Corn, for that cannot be till *ſeges eſt ubi Troja fuit*, which I hope never will be, but why not in *any other Manner*? probably, becauſe it hath been an Opinion, that dwelling Houſes are not to be charged with the payment of Tithes (*e*), there being no Profit ariſing out of them, but certainly this will not paſs for a reaſon now, for common Experience tells us, that Houſes in *London* are of very great Profit both to Landlord and Tenants.

Now admitting that Tithes are not due for Houſes in the ſtrict acceptation of the word, becauſe thoſe are to be paid for things which naturally grow and encreaſe every Year, yet they may be due for Houſes *nomine & loco decimarum*, and in Dr. *Grant*'s Caſe a preſcription for 2 Shillings in the Pound of the Rent of a Houſe was held good, becauſe it might be a *modus* in lieu of the Tithes of the Land upon which the Houſe was built, and if ſuch Land was titheable before the building 'tis unreaſonable that the improvement of it ſhould diſcharge the Parſon's Right.

'Tis true, we find no Statute-law for payment of Tithes in *London* before 27 *H.* 8. (*f*) and then there being ſome differences between the Clergy and Citizens about payment of Tithes, it was referred to the *Archbiſhop of Canterbury*, the *Lord Chancellor Audley*, and to ſeveral other Privy Councellors who made an Order for the payment thereof, which was confirmed in that Year by the Parliament; and ſuch payment was to continue till another Order or Law ſhould be made and confirmed concerning the ſame.

But that Order being defective in ſome Expreſſions, and the Diſputes about payment of Tithes ſtill encreaſing, the Clergy and Citizens of *London*, about ten Years afterwards ſubmitted themſelves to the Order of the ſame *Archbiſhop*, the *Lord Chancellor Wriotheſley*, and ſome other Privy Councellors, who made another Decree to this effect.

That the Citizens ſhould for ever pay to their reſpective Parſons, for every 10*s.* Rent of Houſes, Shops, Warehouſes, Cellars, and Stables within the City of *London* and Liberties thereof 0*l.* 1*s.* 4*d.* and for every 20*s.* Rent 0*l.* 2*s.* 9*d.* and ſo according to that rate.

That if any Houſes or Shops, *&c.* ſhould be let by fraud, reſerving leſs then the uſual Rent, or if a Fine ſhould be

(*d*) 2 Inſt. 659. (*e*) Cro. Eliz. 276. (*f*) 27 H. 8. cap. 21.

taken

taken and no Rent reſerved, then the Tenant ſhould pay after that rate, and according to the Rent which was laſt reſerved for ſuch Houſe, but if it was let at as great a Rent as it was at the making the Statute, then no fraud could be averred.

That if a Houſe, *&c.* is in Leaſe and no Rent reſerved, then it ſhall pay after the rate it was let at the time of the making the Statute, but where a greater Rent is reſerved, it is to pay according to the improved Rent.

But Houſes which were never let but always poſſeſſed by the Owners, pay no Tithes, this is *caſus omiſſus*, but if ever lett, then after the rate they were lett at the Decree.

The Tithes in this caſe cannot be recovered in the Eccleſiaſtical Court, becauſe the Statute declares how it ſhall be recovered.

That the Tenant who lives in the Houſe, and none of his undertenants ſhall be chargeable with this payment.

That if Dwelling-Houſes ſhall be converted into Warehouſes, they ſhall pay Tithes according to the rate aforeſaid *& e Converſo.*

That if a Dye-houſe or Brew-houſe be lett with the Implements, then a third penny of the Tithes is to be abated.

That where a Dwelling-houſe with Shops, Stables, Wharfs with Cranes, Timber-yard, or Gardens belonging to the ſame, and uſed together ſhall be afterwards ſevered, that then the Tenants ſhall pay Tithes according to the aforeſaid rate.

That theſe Tithes ſhall be paid Quarterly, at *Eaſter*, *Midſummer*, *Michaelmas*, and *Chriſtmas*, and that the *Lord Mayor*, by advice of Council, is to hear and determine Differences ariſing upon this Decree, and give Coſts accordingly.

The reſt of the Paragraphs are to be ſeen in Sir *Simon Degg's* (*g*) Parſons Councellor, and ſome Reſolutions upon it, *viz.* that if a Suit is for Tithes in the Eccleſiaſtical Court a Prohibition will lie, becauſe the Statute directs by what manner they ſhall be recovered.

But ſince the Fire of *London* ſome alteration hath been made concerning the payment of Tithes by the Act 22 *Car.* 2. (*h*) which provides, that the *annual* Rent of Tithes in *London*, whoſe Churches were demoliſhed or burnt, and which remain ſingle or are united ſhall be,

(*g*) Fol. 260. (*h*) 22 & 23 Car. 2 cap. 15.

Alhallows

	l.	s.	d.
Alhallows Lombard Street.	100	00	0
St. *Bartholomew Exchange.*	100	00	0
St. *Brides*	120	00	0
St. *Bennet Fink.*	100	00	0
St. *Chriſtophers.*	120	00	0
St. *Dionis Backchurch.*	120	00	0
St. *Dunſtan in the Eaſt.*	200	00	0
St. *James Garlickhith.*	100	00	0
St. *Michael Cornhil.*	140	00	0
St. *Michael Baſſiſhaw.*	132	11	0
St. *Michael Crooked-Lane.*	100	00	0
St. *Margaret Lothbury.*	100	00	0
St. *Mary Aldermanbury.*	150	00	0
St. *Martin Ludgate.*	160	00	0
St. *Peter Cornhil.*	110	00	0
St. *Stephen Colemanſtreet.*	110	00	0
St. *Sepulchre.*	200	00	0
Alhallows Breadſtreet, and St. *John* united.	140	00	0
Alhallows Great and *Leſs* united.	200	00	0
St. *Albans Woodſtreet*, and St. *Olaves Silverſtreet* united.	170	00	0
St. *Ann* and *Agnes*, and St. *John Zachery* unit.	140	00	0
St. *Auſtin* and St. *Faith.*	172	00	0
St. *Andrew Wardrope*, and St. *Ann Blackfryars.*	140	00	0
St. *Antholin*, and St. *John Baptiſt.*	120	00	0
St. *Bennet Gracechurch*, and St. *Leonard Eaſtcheap.*	140	00	0
St. *Bennet*, and St. *Paul, Pauls Wharf.*	100	00	0
Chriſt Church, and St. *Leonard Foſter-lane.*	200	00	0
St. *Edmond the King*, and St. *Nicholas Acons.*	180	00	0
St. *George Buttolph-Lane*, & St. *Butt. Billinſgate.*	180	00	0
St. *Lawrence Jury*, and St. *Magdalen Milkſtreet.*	120	00	0
St. *Magnus*, and St. *Margaret New Fiſhſtreet.*	170	00	0
St. *Michael Royal*, and St. *Mury Vintrey.*	140	00	0
St. *Mathew Fridayſtreet*, and St. *Peter Cheap.*	150	00	0
St. *Margaret Pattons*, and St. *Gabriel Fanchurch.*	120	00	0
St. *Mary* at *Hill*, and St. *Andrew Hubbard.*	200	00	0
St. *Mary Woolnoth*, St. *Mary Woolchurch.*	140	00	0
St. *Clement Eaſtcheap*, and St. *Martin Orgars.*	140	00	0
St. *Mary Abchurch*, and St. *Lawrence Pountney.*	120	00	0
St. *Mary Aldermary*, and St. *Thomas Apoſtle.*	150	00	0
St. *Mary le Bow*, St. *Pancras* and *Alhallows.*	200	00	0
St. *Mildred Breadſtreet*, St. *Margaret Moſes.*	130	00	0
St. *Michal Queenhith*, and *Trinity.*	160	00	0
St. *Magdalen Old-Fiſhſtreet*, and St. *Gregory.*	120	00	0

St. *Mary*

	l.	s.	d.
St. *Mary Somerſet*, and St. *Mary Mounthaw*.	110	00	0
St. *Nicholas Coleabby*, and St. *Nicholas Olaves*.	130	00	0
St. *Olave Jury*, & St. *Martin Ironmonger-Lane*.	120	00	0
St. *Stephen Walbrrook*, and St. *Bennet Sheerhog*.	100	00	0
St. *Swithin*, and St. *Mary Bothaw*.	140	00	0
St. *Vedaſt* alias *Foſters*, St. *Michael Quern*.	160	00	0

The Sums above-mentioned are to be the *annual* Maintenance of the reſpective Parſons, Vicars, *&c.* beſides Glebe and Perquiſites.

The Aldermen or their Deputies and Common-Councilmen of the ſeveral Wards with the Churchwardens, and one or more of the Pariſh to be nominated by them, or any five of them, whereof the Alderman or his Deputy ſhall be one, ſhall aſſeſs proportionably on every Houſe and Hereditament whatſoever, except Parſonage and Vicaridge Houſes, the ſaid reſpective Sums, or ſo much of it as is more then what each Impropriator is enjoined by this Act to follow.

That Perſons aggrieved by ſuch Aſſeſment may complain to the Mayor and Court of Aldermen within fourteen days, *&c.* who upon ſummoning the Party grieved, and thoſe who made the Aſſeſment may determine the ſame without any farther Appeal.

If the Alderman, Deputy, Common-Council-men, *&c.* ſhall neglect to make any Aſſeſment, being ſummoned and required by the Lord Mayor and Court of Aldermen, or the Incumbent ſo to do, then the Lord Mayor and Court of Aldermen may give Authority to any Perſon or Perſons to do it.

The Aſſeſſors within ten days after an Aſſeſment made and Appeals determined (if any ſuch ſhall be) ſhall make three Tranſcripts thereof in Parchment and ſubſcribe the ſame, one of which ſhall within twenty days after ſuch Subſcription be given to the Lord Mayor, another to the Regiſtry of the Biſhop of *London*, and the other to remain in the Veſtry.

The Sum aſſeſſed muſt be paid at the four moſt uſual Feaſts Quarterly, or within fourteen days afterwards by equal payment to commence from ſuch time as the Incumbent ſhall begin to officiate.

The Impropriators ſhall allow what they ought to do before the Fire, and ſuch allowance is to be part of the Parſons Maintenance.

If the Inhabitants refuſe to pay, *&c.* upon demand at the Premiſes, the Lord Mayor, upon Oath of ſuch refuſal, may

may iſſue out his Warrant for the Collector with the aſſiſtance of a Conſtable to Diſtrain, *&c.*

The Lord Mayor neglecting, *&c.* to execute the Powers granted by the Act, the *Lord Chancellor or Keeper, or two Barons of the Exchequer*, may by their reſpective Warrants do what the other ought to have done where the Pariſhes are vacant ſince the Fire, the ſurviving Incumbents of Pariſhes therewith conſolidated ſhall have the like Remedy for Tithes ſettled by the ſaid Act as if actually preſented into both Pariſhes ſince the Union.

That no Court or Judge ſhall determine any Controverſie ariſing upon the Act other then the Perſons therein Authoriſed.

That the Warden and Minor Canons of St. *Pauls*, may recover the Duties ariſing within the Pariſh of St. *Gregory* as formerly.

Lord's-Day.

IT was warmly diſputed in the laſt Age whether,

(1.) The Sabbath was inſtituted at the Creation of the World, and kept by the ancient Patriarchs?

(2.) Whether there is any Morality in the fourth Commandment?

(3.) Whether the Sanctifying one day in ſeven is Ceremonial only.

(4.) Whether the Lord's-day was founded on the Authority of the Church, guided therein by the practiſe of the Apoſtles.

It would be very tedious to recite all the Arguments on both ſides, I ſhall therefore give the Reader a ſhort account of what I think to be the moſt material.

It hath been affirmed that God inſtituted the Sabbath in Paradiſe, that it was obſerved by the ancient Patriarchs before it was given by *Moſes* as a Law to the Jews, and this appears from the Hiſtory of the Creation written by *Moſes* himſelf, who tells us, *God made Heaven and Earth, and every thing therein contained*, and finiſhed this work in ſix days, and that he ſanctified the Seventh Day, becauſe he then reſted, that is, he ceaſed to add any thing more to the World thus created by him.

Thoſe who are of a contrary Opinion tells us, that the *Jewiſh Rabbins* will not allow this to relate to the *very time when the World was created*, or that it was a Command then given to *Adam*, but that it related to the *time when Moſes wrote*

it

it, which was many years afterwards in the Wilderneſs, and that he mentioned this only as an Example to excite the Jews to keep one day in Seven Holy, and to enforce his Commands to them for that purpoſe.

That it was not obſerved by the Primitive Patriarchs, for *Abraham* himſelf, with whom the Covenant was made, did not keep any particular day to the Lord, if he had, it would certainly have been mentioned in the Scripture, which is very exact in the Hiſtory of his Life.

Neither did the *Iſraelites* keep any ſuch day whilſt they were in *Ægypt*, for there they had no manner of reſt from their Labour, they were not ſo much as ſuffered to offer any Sacrifice which had been ſooner finiſhed than in the compaſs of a day.

They deſigned to make their Eſcape from thence, and the better to effect it they Petitioned *Pharoah* to permit them to go three days Journey into the Wilderneſs to Sacrifice to the Lord, but he rather ſuffered them to Sacrifice in *Ægypt*, which *Moſes* refuſed, for fear he ſhould be Stoned to Death, becauſe he muſt have Sacrificed Bulls and Rams, Sheep or Oxen, which were the Gods of the *Ægyptians*.

Beſides, If God had then commanded one day in Seven to be obſerved, the Patriarchs would certainly have known it, for they were acquainted with all the reſt of his Commandments.

As for Inſtance, they had knowledge of the firſt Commandment, by what God ſpake to *Abraham*:

(1.) I am God All-ſufficient, walk thou before me and be perfect.

(2.) Of the Second thus, *viz.* Then *Jacob* went from *Babel* to cleanſe his Houſe from Idolatry.

(3.) The Religious making Oaths, as that of *Abraham* with *Abimilech*, ſhews the care they had not to take the Lord's name in vain.

(4.) The practice of *Iſaac* and *Jacob* ſhews what Duty Children are to pay to their Parents.

(5.) *Jacob*'s Curſing his own Children for the Slaughter of the *Shichemites*; and the Precept which God gave to *Noah* againſt ſhedding Blood, ſhews that they abominated the Sin of Murder.

(6.) The Continency of *Joſeph*; the Puniſhment threatned to *Abimilech* for keeping *Sarah* who was *Abraham*'s Wife, ſhews that Adultery was a Sin.

(7.) *Joſeph*'s purſuing his Brethren for the Silver Cup which was Stolen, ſhews that Theft was unlawful.

(8.) *Abi-*

(8.) *Abimilech*'s reproving both *Abraham* and *Iſaac* for bearing falſe Witneſs in denying their Wives, ſhews that they were not ignorant of that Law.

(9.) *Joſeph* not coveting his Maſter's Wife, ſhews, that they held it unlawful to covet another Man's Wife or Goods.

Having thus ſhewed that the Patriarchs had the Knowledge of the Commands of God, and that the *Iſraelites* did not obſerve any day to the Lord whilſt in *Ægypt*: I ſhall now ſhew, that they did not obſerve it for ſome time after their departure from thence, for they murmured againſt *Moſes* for bringing them from thence (as they imagined) to be ſtarved in the Wilderneſs, but when God ſent Quails and rained down Bread from Heaven, and on the ſixth day gave them double the quantity they had gathered in any other day, this was a preparatory to a ſtrict obſervance of the Seventh Day, that they might then reſt from looking after their daily Bread, and then *Moſes* acquainted them that on the morrow ſhould be the reſt of the Holy Sabbath unto the Lord, and then alſo God deſcended on Mount *Sinai*, and proclaimed the Decalogue to the People in Thunder and Lightning.

About four Years after this Law was given, a Man was taken gathering Stick in the Wilderneſs, and he was ordered by *Moſes* to be ſtoned to death; this was to ſtrike a terror amongſt the *Jews*, the better to enforce their Obedience to the Law for the future.

Afterwards when they came into the Land of *Canaan*, we do not read of any Duties which were to be performed on the Sabbath Day by the Prieſt in conjunction with the People, for that which was required of the Prieſt in order to the Sanctification of that Day, was to ſacrifice two ſupernumerary Lambs of a year old without Blemiſh, more then the two which were the daily Sacrifice, as alſo to prepare and place twelve Peck-Loaves before the Lord, that is, one for every Tribe, and this was called the *Shew-bread*.

Now, tho' the People reſted, the Prieſt had work enough on this Day, but he was excuſable, becauſe it was directed by God.

That which was required by the People was only to reſt from Labour, in imitation of God's reſt after He had finiſhed the Creation; but the Scripture doth not mention how that time of reſt was to be Employed, nor in what Contemplations or other acts of Devotion, for that was left to the Authority of the Church.

'Tis

'Tis true, the Priests Offered Sacrifice for the People, but they might do it without their being present. And when *Moses* delivered the Law into their Hands, he did not appoint them to Read it to the People every seventh Day, but every seventh Year.

Ezra, who was a Priest, and Learned in the Law of *Moses*, was the first who Read the Law on the Sabbath, and this was about 90 Years after the Return of the *Israelites* from the Captivity of *Babylon*.

Thus the keeping a Sabbath is no part of the Law of Nature, because it was Instituted by *Moses*; and 'tis not like those Precepts which are naturally Ingrafted in the minds of Men, As *thou shalt not Kill, Steal, or commit Adultery*, for all these had been Evil without a Prohibition.

It cannot be denied, but that 'tis agreeable to the Law of Nature to observe some peculiar time for the Service of God, this was done by the *Hebrews* before the Law, when all days were alike; but 'tis almost Impossible for us to know whether on the first or seventh Day, after such a Circulation of Weeks as have been since the Creation of the World, or even since the Birth of our Saviour, for the Jews never divided their time by Weeks till they came out of *Ægypt*, nor the *Romans*, till Christianity got footing in the Empire, which was about 520 Years after our Saviour was Born, so that the keeping the seventh Day Holy rather than any other Day, must be attributed to a Positive Law, and not to any Divine Authority.

(2.) The fourth Commandment is Moral as to the Duty, but Ceremonial as to one day in Seven, and this was the opinion of *Aquinas* and the Schoolmen, it differs from all the rest of the Commandments which are Moral, which is thus proved;

God never commanded any thing to be done contrary to the Law of Nature, unless it was to try the Faith of a Person, as in the Case of *Abraham*; but the Sabbath hath been broken by the express Command of God himself, as in the Case of the Children of *Israel*, whom he Commanded to Besiege *Jerico* on that Day; then the Priests blew their Trumpets, the People Shouted, and the City was Destroyed,

And not only upon this extraordinary occasion, but this Day was also broken by the publick and open Practise both of the Priest and People, in the common and ordinary course of Nature, as in the Case of Circumcision, which, tho' a Sacrament, was a Bodily Labour, for if a Child was Born on the seventh Day, he must be Circumcised on that Day, and then a Seat must be prepared to hold two Persons, which was

to

to be Covered with rich Carpets, in one Seat the Sureties were placed with the Child, and in the other the Circumciſor, then came a Perſon with a great Torch, about which were twelve Lighted Wax-Candles, then two Boys with Cups of Red Wine to waſh the Circumciſors Mouth after he had done his Work, another carried his Knife, another a Diſh of Sand, in which the Foreskin was to be caſt, another a Diſh of Oyl, in which were Clouts of Linnen to be applied to the Wound, and ſome other Perſon with Spices and ſtrong Wines to refreſh the People, this was only preparatory to the Act it ſelf, which was very troubleſome, and all this was Bodily Labour.

When our Saviour was Born, the Cuſtom was to Read a Section of the Law every Sabbath-day, out of the five Books of *Moſes*, which was divided into 54 Parts, and the Prieſt Expounded upon it, and this way of keeping that Day was countenanced by his Preſence; but when the Jewiſh Nation was Deſtroyed, this Cuſtom was no longer Obſerved.

But neither our Saviour or his Diſciples did ordain another Sabbath, for it was the Church which did it to commemorate his Reſurrection, by ſetting a-part that day on which he Aroſe, to Holy and Religious Purpoſes, for when Chriſt ſaid *pray, that your flight be not in Winter, neither on the Sabbath, &c.* it was ſpoken to the Jews, and not to his Apoſtles, for they were all gone from *Jeruſalem* before the Wars of *Titus* and *Veſpaſian*.

That the Deſcending of the Holy Ghoſt upon the Apoſtles on the *Feaſt of Pentecoſt*, which happened that Year on a Sunday, was no manner of Evidence that the day was to be dignified as a Sabbath, becauſe it was a removable Feaſt, and it was a caſual thing that it happened on that day.

The Preaching of St. *Peter* on that day, and Baptizing three thouſand Converted Jews, ſeems to be a better Proof that the Apoſtles then began to ſet a-part that day for Religious purpoſes, if they had not done almoſt the ſame thing every day, for ſince the Lord *added daily to the Church ſuch as ſhould be Saved*, certainly the means of their Salvation was Adminiſtred every day.

But I ſhall no longer inſiſt on theſe Diſputes, whether the Sabbath was obſerved by the Jews as a Moral Precept, and ſo became Eternally binding, or whether it was Abrogated with the whole Ceremonial Law at the Deſtruction of the Temple, whether it was Inſtituted by our Saviour, and Commanded by his Apoſtles, or enjoyned by the Authority of the Church, by the Voluntary Conſecration of it to Pious Uſes, and the Obſervance of it enforced by the Laws of Princes, by the Canons of Councils and Decretals of Popes and other Prelates.

I shall only say, that 'tis the general Opoinion of the Reformed Divines, that the Lord's-day was founded on the Authority of the Church.

That as to us here in *England*, all Sundays, and the great Festivals, were observed by our Ancestors the *Britains*, and we find that in the time of the *Saxons*, King *Ina* made a Law, that if a Servant Worked on the Lord's-day by the the Command of his Master, it was a sufficient cause to Discharge him from his Service, and to make him Free; but if he Worked without such Order, the Servant was to be Whipped; so if a Freeman Worked on that day he was to be made a Bondman, or to pay sixty Shillings.

King *Alfred* after him, made a Law that Freemen should enjoy their Liberties on the Lord's-day, and certain Holidays.

When the *Danes* had subdued the *Saxons*, *Canutus* made a Law at *Winchester*, that there should be no Market nor Hunting, nor any meeting of the People for Civil Affairs on that Day, unless in cases of necessity.

Yet in the time of the *Normans*, Markets were generally held on the Lord's-day, and Ecclesiastical Synods and Councils for State Affairs, and so they are still.

But when *Stephen Langton* was made Archbishop, which was in the Minority of King *John*, it was decreed in a Council held at *Oxford*, *Anno* 1222. that Sunday should be observed with all Reverence, and that no Servile Work should be done on that day, only Tillage and Sailing were allowed, if occasion required.

About 130 Years afterwards, in a Synod held by Archbishop *Islip*, it was decreed there should be a general restraint from all manner of work on Sundays.

But notwithstanding these Restrictions and Decrees, Fairs and Markets were still kept on that day, and usually in the Churchyards, where they are kept in many place at this time, and particularly that great Fair held every year at *Bristol* on St. *James*'s-day, is kept in St. *James*'s Church-yard

The first restraint of keeping Markets and Fairs on Sunday was, *Anno* 28 *Edw.* 3. *cap.* 14. in which year a Statute was made, enacting, That Wools might be exposed to Sale at the *Staple* every day in the Week, except Sunday.

The like restraint was made by Act of Parliament, *Anno* 27 *Hen.* 6. *cap.* 5. upon pain to forfeit the Wares exposed to Sale in such Fairs, *&c.* to the Lord of the Franchise.

But tho' Markets and Fairs might not be kept on Sundays, yet People might expose Goods to Sale in their Shops on those days, and therefore *Anno* 4 *Edw.* 4. *cap.* 7. a Statute was made,

to prohibite Shoemakers in *London*, or within three Miles round that place, to Sell any Boots or Shoes on the Sabbath-day, which implies that they might be Sold elſewhere.

Anno 5 *&* 6 *Edw.* 6. *cap.* 3. A Law was made that all Sundays in the Year ſhould be kept Holy; 'tis true, this Law was Repealed *Anno* 1 *M.* and ſtood Repealed all Queen *Eliz.* Reign, but by an Act made *Anno* 1 *Jac. cap.* 25. that Statute was Repealed, but the Act 5 *&* 6 *Edw.* 6. was not Revived by expreſs words, for that reaſon it was Queſtioned whether it was in force; but the Law ſeems to be that where a (*a*) Statute which Repeals another is Repealed it ſelf, it makes the firſt Act which was Repealed ſtill in force.

By the Statute 1 *Eliz. cap.* 2. no Diſtinction is made between Sundays and Holidays, for all Perſons are enjoyned by that Act to reſort to their Pariſh Churches, or upon let thereof to ſome other Church on thoſe days.

Anno 1 *Car.* 1. *cap.* 1. All concourſe of People out of their own Pariſhes, for any Paſtime, was prohibited on this day; as alſo Bear-baitings, Bull-baitings, Enterludes, common Plays, and all other unlawful Paſtimes.

The Proſecution was to be in one Month after the Offence, the Forfeiture was to be 3 *s.* *&* 4 *d.* to the uſe of the Poor where the Offence was committed, and the Conviction was to be by view of the Juſtice of Peace, or chief Officer in a Corporation, or by the confeſſion of the Party, or by the Oath of one Witneſs before ſuch Juſtice, *&c.* or Officer, and it was to be recovered by Diſtreſs, *&c.* by virtue of a Warrant from them, reſpectively directed to the Churchwardens or Conſtable of the Pariſh, and if no Diſtreſs could be taken, then the Offender wasbe put into the Stocks three Hours.

By the Statute 3 *Car.* 1. *cap.* 1. Carriers and Drovers are prohibited Travelling on the Lord's-Day, under Penalty of 20 *s.* and Butchers Killing or Selling Meat forfeit 6 *s.* *&* 8 *d.* the Conviction, the Levying, the Forfeiture, and the Employment thereof, are the ſame as in the Statute 1 *Car.* 1. except in the Proof, and that muſt be by two Witneſſes, and the forfeiture is to be recovered in the Seſſions, *&c.* and the Juſtices may allow the Proſecutor part thereof, but not above the third Part, and the Proſecution muſt be within ſix Months after the Offence.

Anno 29 *Car.* 2. *cap.* 7. It was enacted, that all Laws in force concerning the Obſervation of the Lord's-day ſhould be put in Execution, and that all Perſons ſhould on every Lord's-

(*a*) 2 Inſt. 686.

day

day exerciſe themſelves both publickly and privately in Duties of Piety, and that no Perſon ſhould do any Worldly labour or buſineſs on that day, (Works of Charity and Neceſſity only excepted;) and all of the Age of fourteen Years and upwards offending in the premiſſes were to forfeit 5 *s.* and no Perſon is publickly to Cry or expoſe any Wares to Sale on that day, on pain to forfeit them.

Butchers, Drovers, Higlers, Horſe-Courſers, Waggoners and their Servants, are prohibited to Travel on the Lord's-day, on pain to forfeit 20 *s.* Wherry-men and Boatmen are likewiſe prohibited, unleſs allowed by a Juſtice of Peace or Head-Officer, the forfeiture is 5 *s.*

The Conviction is more eaſie than by the former Statute; for 'tis to be before a Juſtice of Peace or Head-Officer of a Corporation, if the Offence is committed there, either upon his own View, by the confeſſion of the Party, or Oath of one Witneſs, and the Penalty is to be recovered by a Warrant from the Juſtice, directed to the Churchwardens or Conſtable, to Diſtrein the Offenders Goods, and if no Diſtreſs can be had, then he is to be put in the Stocks for two Hours.

The Penalties when recovered are to be for the uſe of the Poor where the Offence was committed, except ſo much thereof as the Juſtice of Peace ſhall think fit for the Reward of the Informer, which is not to exeed a third Part.

But Cooks and Inn-keepers may Dreſs Meat on Sundays, and People may cry Milk before Nine of the Clock in the Morning.

The Proſecution upon this Act muſt be within ten Days after the Offence.

And tho' by the Statute 1 *Will.* a Toleration is given to ſome Perſons to abſent themſelves from their Pariſh Churches, yet none of the Acts beforementioned for the Obſervation of the Lord's-day were Abrogated or Repealed, but are ſtill in force, and Perſons may be puniſhed for not coming to their Pariſh Churches on that day, unleſs they go to ſome Congregation Tolerated by that Act.

From all which we may ſee, that it hath been under the conſideration of ſeveral Parliaments to ſuppreſs all manner of Prophaneſs on the Lord's-day, which doth generally ariſe either from *Covetouſneſs* or *Licentiouſneſs*.

And therefore, ſelling Goods, keeping Fairs or Markets, and travelling about Worldly occaſions are prohibited on that day; all which things are uſually done out of a Covetous deſire of ſome Profit or Gain.

And meeting together in other Pariſhes for Sports, Bear-baiting, Bull-baiting, Stage Plays, and other unlawful Games, were prohibited, becauſe ſuch Paſtimes tend to all manner of Irreligious Licentiouſneſs to debauch the People in their Morals, and to introduce a contempt to Religious Performances, and to the Service of God.

But by the Common Law, as well as by the Statutes, there is a due obſervance to be given to the Sabbath; for *dies dominicus non eſt juridicus*, Mr. *Fitzherbert* (*a*) tells us, that no Plea ſhall be holden in *Quindena Paſchæ*, becauſe 'tis always on a Sunday, and 'tis Error if a Writ (*b*) ſhould bear *Teſte* on that day.

By thoſe Statutes (*c*) likewiſe, if any Perſon travelling on a Sunday is Robbed, the *Hundred* ſhall not be charged with the Robbery, neither ſhall any Proceſs be ſerved except in caſes of Treaſon, Felony or breach of the Peace, but ſuch ſervice ſhall be void, and the Perſon ſerving the ſame ſhall be liable to Damages as if he had done it without any Warrant.

Marriage.

MARRIAGE is one of the Rights of Humane Nature, it was Inſtituted in a State of Innocence, and therefore I cannot ſee any reaſon why it ſhould be forbidden to the Clergy; for if ſuch a State of Life would have obſtructed them in any Divine Performances, 'tis reaſoneble to imagine that it would have been prohibited by the Moſaical Law, which was ſo far from any ſuch prohibition to the Jewiſh Prieſthood, that even the High-Prieſt himſelf was to be a Married Man, for otherwiſe the Prieſthood could not lawfully deſcend to his Iſſue, which was poſitively ordained by God himſelf.

In the Goſpel Diſpenſation we find that Chriſt did not prefer any of his Apoſtles before St. *Peter*, who was a Married Man, neither did he charge any Man to forſake his Wife. St. *Paul* tells us, it was *an honourable State in all, and that every Man ſhould have his own Wife*, which are general words, and not excluſive of the Clergy; and *Celibacy* is no where propoſed as a neceſſary Qualification for a Man in Holy Orders, but on the contrary, that *a Biſhop ſhould be the Husband of one Wife*, ſo that the Clergy are not forbideen to Marry either by the Jewiſh or Goſpel Diſpenſation.

(*a*) F. N. B. fo. 17. (*b*) Dyer 168. (*c*) 29 Car. 2.

Fig

'Tis true, they are prohibited by the Laws of the Church, but 'tis by aſſuming a Power which the Church never had, for as it hath been obſerved, it was never forbidden by our Saviour who planted the Chriſtian Church, and as a learned * Prelate tells us, he beſt knew what humane Nature was able to bear, and that if Celibacy had been neceſſary, he would have required it of thoſe to whom he gave Commiſſion to Preach his Goſpel, and certainly his Diſciples and the Apoſtles required a greater freedom from the cares of a married Life than what is neceſſary for thoſe who ſucceed them after the Church was in a ſettled Condition.

I grant that in the firſt Ages of Chriſtianity the *Nicholaitans*, the *Gnoſticks*, *Montanus*, and other Heretiques condemned the marriage of Prieſts, but the Fathers who lived in that Age tell us, this was a device of the Devil to advance his Kingdom by Fornication and Uncleanneſs, they conſtantly aſſerted, that it was lawful for all Men to Marry without diſtinguiſhing between the Laity and the Clergy.

But when the Papal Power encreaſed, and the Clergy were generally engaged to ſupport it againſt the Civil State, then were Cannons made againſt Marriage, not that it was unlawful in it ſelf, but it was to ſeparate them from the Civil Society, knowing they would have leſs regard for the State when they gave no lawful Pledges to ſupport it.

But tho' ſuch Canons were made againſt the Marriage of Prieſts, yet they were never received here, but only in *Italy* and *France*, for the Britiſh Clergy had Wives, but they went vailed, and when the *Saxons* ruled here moſt of the Clergy were Married; but when St. *Dunſtan* had got King *Edgar* on his ſide to favour the Monks, then he preſſed the married Clergy to leave their Wives, which they refuſing were deprived, and the Monks put in their Benefices, who invented this Story, *viz.* that thoſe married Perſons who diſobeyed St. *Dunſtan's* Order, were with their Wives and Children transformed into Eeles, from whence the *Iſle of Ely* took its name, and this I take to be as credible a *Metamorphoſis* as any in *Ovid*, there was another Monkiſh Story of this Nature about the ſame time, *viz.* that at a Synod held at *Wincheſter* under that St. *Dunſtan* a wooden Croſs gave its Suffrage againſt married Prieſts, upon which occaſion we have theſe Verſes.

Humano more crux præſens edidit ore,
Cælitus efflata quæ proſpicis hic ſubarata,
Abſit ut hoc fiat & cætera commemorata.

* E. H. R.

But 'tis certain that the Prieſts did keep their Wives long after the Conqueſt, for at a Synod held at *Weſtminſter* about the third Year of *H.* 1. where *Archbiſhop Anſelme* preſided, a Canon was made prohibiting all Prieſts to Marry, or to keep a Wife tho' married.

Henry Archdeacon of Huntingdon, made this Obſervation upon that Canon, *viz.* that it might ſeem very pure to ſome, but as dangerous to others, for thoſe Prieſts who were not able to contain, would by this means fall into horrible uncleanneſs to the great diſgrace of the Chriſtian Religion.

Ralph Biſhop of Rocheſter who ſucceeded *Anſelme*, did not concern himſelf in this matter, but *Cardinal Crema*, who about that time was ſent hither by Pope *Honorius* as his *Legate de Latere*, held a Synod at *London*, in which he made very ſevere and invective Speeches againſt the married Clergy, telling them that it was a horrid ſin for a Prieſt to riſe from a Woman and immedately to make the Body of Chriſt, and the next day after he made this Speech, he ſaid Maſs himſelf, and at Night was taken in Bed with a Whore.

This Story is delivered to us by the Writers of that Age, and we have no reaſon to queſtion the truth of it, for *Henry of Huntington* who lived at that time, and who was a Prieſt himſelf and the Son of a Prieſt, gives a large account of this matter, and concludes that it was too notorious to be denied.

Two Years afterwards another Synod was called at *London*, where ſome Canons were made to enforce thoſe concerning the Celibacy of the Clergy, and two Years after that, another was held at *Weſtminſter*, where it was decreed that Prieſts ſhould leave their Wives before the next St. *Andrew*'s Day, or be deprived.

But the Clergy being unwilling to comply to this Decree, the Execution thereof was left to the * King, who took Money of ſeveral Prieſts by way of Commutation, and ſo permitted them to live with their Wives, and by this means that Conſtitution was in a manner ſet aſide.

By theſe Canons there was a ſtricter Obligation upon the Regulars then upon the Secular Clergy, becauſe they had vowed Chaſtity, and therefore my *Lord Coke* (*a*) tells us, that if a Deacon or Secular Prieſt had taken Wife, the Marriage was not void, but voidable *cauſa profeſſionis*, and if they had Children, and either Husband or Wife had died before a Di-

* H. 1. (*a*) 2 Inſt. 687.

vorce

vorce ſuch Children ſhould Inherit; but if a Monk or Nun had Married it was void, becauſe they had vowed Chaſtity.

But the incontinency of the Prieſts was ſo notorious, that about 46 years after the laſt Canon was made concerning the Celibacy of the Clergy, which was *Anno* 25 *H.* 2. *Richard Archbiſhop of Canterbury* in a Synod held at *Weſtminſter* prohibited Men in Orders from keeping *Concubines* as well as from Marriage, and the like was done *Anno* 7 *R.* 1. by *Hubert Archbiſhop of Canterbury*, and then Chief Juſtice of *England*, who preſided in a Synod for that purpoſe held at *York*.

Anno 9 *H.* 3. *Stephen Langton* revived thoſe Decrees, and added a puniſhment to the Concubines of beneficed Prieſts, and of Men in Orders, not when they were living, but after they were dead, *viz.* That they ſhould not have Chriſtian Burial unleſs they had repented, and that the Prieſts ſhould not be admitted to the Sacraments ſo long as they kept ſuch Women.

But notwithſtanding theſe Conſtitutions, ſeveral of the married Clergy ſtill kept their Benefices till *Cardinal Otho* in the beginning of the ſame King's Reign, *viz.* *H.* 3. made a poſitive Canon, that ſuch Prieſts ſhould be *ipſo jure privati*, that their Wives and Children ſhould have no benefit of their Husbands or Fathers Eſtates, which were gotten during the time of ſuch Marriage, but that the ſame ſhould be veſted in the Church where they reſided, and that their Children ſhould be diſabled to take Orders without a Diſpenſation.

And thus it continued for almoſt three hundred Years, *viz.* till the Reign of *H.* 8. in all which time ſuch ſcandalous Crimes were committed, that Diſpenſations to keep Concubines were very common, if the Prieſts had Money enough to purchaſe them; but leaſt they ſhould give a bad Example to the People, they kept theſe Concubines not in their Houſes but privately, for there was a Canon made againſt thoſe, *qui in domibus ſuis Concubinas publice detinent eas a ſe removeant infrà menſem*, and this made them take Lodgings for them, which occaſioned the making another Canon, that they ſhould not have *publick* acceſs to them there *cum ſcandalo*.

Sir *Simon Degg* obſerves that it was wiſely done by the *French* and *German* Laiety to ſollicite the Council of *Trent*, that Prieſts might be tolerated to Marry, as being unwilling to truſt their Wives and Daughters at Confeſſion with Men who might have Concubines but no Wives, and that Pope *Pius* 2d. affirmed there were many good reaſons againſt the Marriage of Prieſts, but none which could ſtand in competition with thoſe reaſons which were for it.

But I do not find that the Prieſts in thoſe days were reformed by thoſe Canons, therefore *Anno* (*b*) 1 *H.* 7. it was thought requiſite to add a Temporal Law to thoſe Spiritual Decrees in order to puniſh their incontinency, and it was, *that the Ordinary might commit ſuch Prieſts to Priſon during Pleaſure*, and this Law is ſtill in force.

About fifty five Years afterwards (*c*) an Act was made to declare it *Felony* for a Prieſt to Marry, or if married, carnally to know his Wife, or ſo much as publickly to Converſe with her, or for any Perſon to Preach or affirm that it was lawful for a Prieſt to Marry.

But the puniſhment by Death was thought too ſevere, therefore in the very next Year (*d*) it was repealed, but it was then Enacted, That if a Prieſt was guilty of *Incontinency* he ſhould forfeit all his Goods, *&c.* and all his Spiritual promotions except one, and for the ſecond Offence (being convicted) he ſhould forfeit all his Goods, and the Profits of his Lands, Benefices and Promotions, and for the third Offence ſhall forfeit as before, and be committed during Life.

But theſe Severities were not effectual to prevent this Vice, therefore in the ſame Year (*e*) another Act was made, by which all Marriages were declared to be Lawful, which were not prohibited by God's Law.

This was a general Law in which the Clergy as well as the Laity were comprehended, but the Statute which more immedately concerns them was made *Anno* 2 *&* 3 *Ed.* 6. (*f*) the Preamble ſets forth, that it would be better for Prieſts to live chaſt and ſeparate from the company of Women, that they might with more fervency attend the Miniſtry of the Goſpel, and that it was to be hoped they would of themſelves vow perpetual Chaſtity, but that when it was enforced by ſevere Laws, ſuch inconveniences did follow which were not fit to be mentioned; therefore it was Enacted, *That all Laws, Canons, and Conſtitutions prohibiting the Clergy to Marry (who by the Laws of God might Marry) and all Pains and Forfeitures therein contained ſhould be void.*

This was taken to be only as a toleration for Prieſts to Marry, as *Uſury* and other unlawful things were allowed by the State, in order to prevent greater inconveniencies, and that notwithſtanding that Act it was ſtill unlawful for the Clergy to Marry, and the iſſue of ſuch Marriages were accounted Baſtards, therefore *Anno* 5 *&* 6 *Ed.* 6. (*g*) another Act was made, by which it was declared, that the Marriage

(*b*) 1 H. 7. cap. 4. (*c*) 31 H. 8. cap. 14. (*d*) 32 H. 8. cap. 10. (*e*) 32 H. 8. cap. 38. (*f*) 2 & 3 Ed. 6. cap. 21. (*g*) 5 & 6 Ed. 6. cap. 12.

of

of Prieſts ſhould be held Lawful and their Children Legitimate and inheritable, and that they ſhould be Tenants by the curteſie, and their Wives endowed.

But *Anno* 1 *Mariæ* thoſe *Statutes* were repealed, and ſo continued all Queen *Elizabeth*'s Reign, but in the firſt year of King *James* they were revived, and ſo they continue to this day, ſo that all Statutes, Canons and Decrees which prohibite the Marriage of Prieſts are now void; but ſome are of Opinion, that the Laws which inflict puniſhments for their incontinency are ſtill in force.

And thus much for Marriage as it relates to the Clergy, I ſhall now mention ſomething concerning it as 'tis a Civil Contract between the Parties, which all Chriſtian Nations have agreed ſhould be publiſhed in a Solem manner, and both the *Jews* and the *Heathens* themſelves had ſome particular Solemnities upon this occaſion, which may not be improper here to mention, becauſe in ſome Circumſtances they agree with the form uſed amongſt us.

Amongſt the *Jews* the Man and Woman were led to the Houſe of Marriage by their ſpecial Friends, who were called the Children of the Bride-Chamber, and there were to be preſent ten Men at leaſt, and the Bill of Dowry being ratified by a publick Notary, the Man ſpoak thus to the Woman, *viz. Be thou a Wife to me according to the Law of* Moſes, *and I will worſhip and honour thee according to the word of God; I ſhall feed and govern thee according to the cuſtom of thoſe who worſhip, honour and govern their Wives faithfully, I give thee for Dowry of thy Virginity fifty Sheckls*, which in our Money is 3 *l.* 2*s.* 6*d.*

This ſeems to be comprehended in our Form, *With my Body I thee worſhip, and with all my worldly Goods I thee endow.*

Amongſt the *Romans* there were three ſorts of Marriage, *viz. Confarratione, Coemptione, Uſu.*

The firſt of theſe was performed with great Solemnities by the High Prieſt himſelf offering Sacrifices to their Gods, and particularly of a Barley Cake, part whereof was afterwards eaten by the married Couple, and 'tis probable that we derived from them the Cuſtom of making a Bride-Cake at our Weddings.

Coemption was the ſolemn binding themſelves to each other by giving and taking a piece of Money: We have ſomething like this at our Marriages, *viz.* the Man uſually giving the Woman ſome Money at that time, which is called the Endowment Money, this is not eſſential to a Marriage, for 'tis often omitted, becauſe the Man muſt ſay *with all my Goods I thee endow:* In the firſt Ages of Chriſtianity this was done

done in writing, and ſuch writings were called *tabulas dotales*, which may be another reaſon why the word *Endow* is ſtill continued in our Marriages.

The *Romans* likewiſe uſed the Ceremony of a Ring, and this appears by the *Satyriſt* in theſe words,

Digitis pignus fortaſſe dediſti. (*h*)

We might likewiſe derive this Cuſtom from them, and we put it on the fourth Finger becauſe there is a Nerve which from thence is joined to the Heart, 'tis a Ceremony of great Antiquity, and 'tis a token that the married couple ſhould continue in that State without *End*, that is, as long as they both live.

And as theſe Ceremonies are required at the time of Marriage, ſo ſome are neceſſary before it, and that is by *asking the parties in the Church*, which is expreſly provided by the Statute 2 & 3 *Ed.* 6. *viz.* that no Man ſhall have liberty to Marry without ſuch *asking*, which we call the publication of the *Bans*, *&c.* and this is the very ſignification of the word it ſelf, 'tis true the old Gloſſographers tell us that it ſignifies a Proclamation, but as applied to Marriage it rather imports a Publication, and this muſt be done three times, either on Sundays or Holidays in the Church where the Parties live, that any Perſon may have convenient notice to object againſt the intended Marriage.

Bans.

And if the objection is material then the Miniſter ought not to proceed (*i*), if he doth, the Party may complain to the Ordinary who will ſend an Inhibition to him.

There are ſeveral objections which are material, *viz.* *Precontract* before good Witneſſes, *Conſanguinity* or *Affinity*, Parents not conſenting, or Guardians if the Parties are under Age, for in ſuch caſe they are not *ſui juris* and therefore by another Canon (*k*) it was enjoined that Infants ſhould not Marry without their Parents conſent, and if a Miniſter ſhould Marry them without ſuch conſent, teſtified by themſelves in Perſon, or by ſufficient Witneſſes, that he ſhould be *ipſo facto* ſuſpended for three Years, tho' the Bans were publiſhed. (*l*)

If the Marriage proceed it muſt be done in *facie Eccleſiæ* (*m*), but this is diſuſed, it ought likewiſe to be in one of the Churches where one of the Parties lives, and in time of Divine Service, and this is required by the Canon, tho' the Perſon hath a Licenſe.

But by the ancient Canons it was to be celebrated in the Church of that Pariſh where the Woman was an Inhabitant,

(*h*) Inven. Satyr. 6. (*i*) Can. 102. (*k*) Can. 100. (*l*) Can. 62. (*m*) Can. 104. and

and therefore at this time there is a Fee due to the Miniſter of that Church, tho' the Parties are Married elſewhere, but this is only by the Eccleſiaſtical and not by the Common Law (*n*) without a Cuſtom to ſupport it.

This *asking* is likewiſe required by the Rubrick in the Common Prayer, which is confirmed by Act of Parliament.

But by the Eccleſiaſtical Canons (*o*) now in Force, 'tis ordained, that ſuch who have Epiſcopal Juriſdiction, or the Commiſſary of the Faculties, Vicars General of Prelates, Guardians of the Spiritualties *ſede vacante*, or Ordinaries exerciſing Epiſcopal Juriſdiction may grant *Licenſes* to Marry without Bans.

Licenſes.

However 'tis expreſly required by the Canon, that ſuch Licenſes be granted only to thoſe who are of good Eſtate and Quality, and ſecurity muſt be taken that there is not any impediment of Precontract, Conſanguinity, Affinity, or any other juſt Cauſe to hinder the Marriage, nor that there is any Suit depending in any Eccleſiaſtical Court concerning any Contract or Marriage on either ſide, and that the Parties have the conſent of Parents, *&c.* and likewiſe that the Marriage ſhall be celebrated in the Pariſh-Church where one of the Parties dwelleth and in no other place, and that between the Hours of eight and twelve in the Morning.

And it muſt appear to the Judge (*p*) (who grants the Licenſe) upon the Oath of two credible Witneſſes that the conſent of Parents was obtained (*q*), and one of thoſe Perſons muſt likewiſe Swear that he believeth there is no impediment of Precontract, Kindred, *&c.* nor any Suit to hinder the Marriage, and this muſt be done before the Licenſe is granted, and that Perſons offending in the Premiſes ſhall be ſuſpended from the execution of their Office for ſix Months, and all Licenſes to the contrary ſhall be void, and the parties Marrying ſhall be ſubject to ſuch Puniſhments which ſhall be appointed for clandeſtine Marriages.

'Tis true, theſe Canons were made in Convocation, and confirmed by Letters-Patents, and are become part of the Law of the Land for the government of the Church, but yet they cannot alter or ſuperſede the Statute-Law, which is expreſly againſt marrying without publiſhing the Bans, that is, without asking in the Church.

But the Power of diſpenſing in ſuch caſes is likewiſe eſtabliſhed by a Statute-Law, and ſuch a Power was granted to the Biſhops *Anno* 25 *H.* 6. *cap.* 21. *viz.* that they might diſ-

(*n*) 2 Lut. 1062. (*o*) Can. 62. (*p*) Can. 103. (*q*) Can. 103.

penſe

penſe as they had uſually done by vertue of the Common Law or the cuſtoms of the Realm, and ſuch Licenſes have been granted here ever ſince the Reign of *Ed.* 3.

We rarely meet with any Proſecutions againſt Miniſters Marrying, or againſt Perſons being Married without Licenſe or Bans (*r*), ſome there are, as for inſtance, an Incumbent both of a Donative and a Preſentative Church married two Perſons in the *Donative* without Licenſe or Bans, and upon a Proſecution againſt him in the Spiritual Court, a Prohibition was denied, becauſe he ought to have Married then in the Preſentative Church.

So *Anno* 5 *Will.* (*ſ*) there was a Marriage in a Conventicle without Licenſe or Bans, the Man was proſecuted in the Spiritual Court for Incontinency and Fornication, he ſuggeſted the Statute 1 *Will. cap.* 5. which exempts Perſons from Proſecutions in that Court for Non-conformity to the Church of *England*, ſo as they take the Oaths of Allegiance and Supremacy, and ſubſcribe the Declaration, *&c.* that he had qualified himſelf according to the Statute, and that he was Married before Witneſſes in the Face of their Congregation, and therefore ought not to be proſecuted for not conforming to the Church of *England* in their Marriages, there was a Prohibition granted, and a Rule made that the Party ſhould Declare upon it, ſo that upon a Demurrer the Law might be determined, but it was never argued.

But there being ſome Churches and Chapels exempted from the viſitation of the Ordinary, the Miniſters of ſuch Churches did uſually Marry without either Licenſe or Bans, and theſe were called (not improperly) lawleſs Churches, for by this means thoſe good Laws which had been made to prevent clandeſtine Marriages were become ineffectual.

Therefore *Anno* 7 *&* 8 *Will. cap.* 35. a Statute was made prohibiting all Parſons to Marry People, or ſuffer them to be Married in their Churches or Chapels exempt or not exempt, or in any other place whatſoever without publication of the *Bans*, *&c.* or without a *Licenſe*, the Penalty is 100 *l.* for each Offence to he recovered by Action of Debt, Bill, Pleint or Information, one Moiety to the Queen the other to the Informer, and the Man thus Married forfeits 10 *l.* to any Perſon who will Inform, and this is to be recovered in the ſame manner with coſts of Suit, and every Sexton knowingly aſſiſting at ſuch Marriage forfeits 5 *l.* to be recovered with Coſts as aforeſaid.

(*r*) Sid. 422. (*ſ*) 3 Ley. 376.

So that now these lawless Churches, so called, because they were not subject to the Canons, and which were exempted from Episcopal Visitation by the Pope's Bulls, in favour of some Monastry of regular Monks or Fryars, and which continued till that Statute was made *, are now made subject to that Law, which did not altogether prevent clandestine Marriages, for the lower House of Convocation several Years afterwards complained to the Bishops of the Scandal occasioned by such Marriages.

But ever since Licenses were granted, the Cognizance of the Sufficiency of them, both in point of Form and all other Circumstances, belonged to the Ecclesiastical Court, and the Party had no remedy but by Appeal if they Judged Wrong; but if the Question was, whether the Bishop had Power to grant a License, and they adjudged against such a Power, a (a) Prohibition did lie.

Certificate of the Bishop. And as they had Cognizance of Licenses, so they had a Jurisdiction as to the lawfulness of Marriage. For after the Empire became Christian, Princes had so much honour for the Bishops, by whose means they were Converted, that they gave them Jurisdiction in particular Causes, of which Marriage was one, because it was always celebrated in *facie Ecclesiæ*, and therefore at this day if Issue is joyned upon the lawfulness of a Marriage it must be tried by the Bishop in his Consistory Court, and for that purpose the Courts of Law write to him to certifie the legality of the Marriage, and then give Judgment according to that Certificate.

But if the Marriage is only in Issue, and not whether the Parties were lawfully Married or not, this must be tried at (b) Common Law.

In *Dower*, the Issue was, that the (c) Woman was not lawfully Married, and the Bishop certified that the Man was *circiter ætatem* 12 *Annorum*, and that the Woman was Sixten, and that they contracted Marriage, which they procured to be lawfully solemnized in the Church.

This was held an insufficient Certificate, because the Bishop did not certifie the lawfulness of the Marriage, he was fined 20 *l.* and another Writ was directed to him to make a better Return, and thereupon he certified the Age of the Man to be eleven Years, ten Months, and twenty Days, and that the Marriage was lawfully solemnized between them in the Church, *&c. Et sic in legitimo Matrimonio Copulati fuerunt*, and

* March. 1700. (a) Jones 257. (b) 2 Cro. 102. (c) Dyer 305.

this

this return was held insufficient by several Civilians, both in point of Form and in Law, because the words *& sic in legitimo matrimonio Copulati* were only an inference collected from the Premisses, and not his direct answer to the Writ as it ought to be, and as to the Law it was held, that the Bishop ought not to certifie that the Marriage was lawful, because the Man was under twelve Years of Age, for before that time he cannot by Law consent to Marry.

But seven Years afterwards the Bishop certified the matter again, almost in the same Form, only he returned the Inquisition, and that it *plainly appeared by the proofs* that they were *legitimo matrimonio Copulati*, and as to the point of the Law most of the same Civilians changed their opinions that the Marriage was lawful, but this must be *quoad Dotem*, for by the Law 'tis only a Marriage *de facto*, and in such case the Wife shall be endowed.

Two of the Judges excepted against the Form, *viz.* That the Bishop ought to have certified his own Opinion of the Marriage, and not what appeared to him upon the Inquisition to be lawful.

But where in Dower upon the like Issue, the(*f*) Bishop certified that the Parties were *in vero matrimonio Copulati sed clandestino*, this was held a good Return, for if it was a true Marriage it was lawful.

Time in which Marriage is prohibited.

'Tis certain, that Marriage hath been encouraged in all civilized Governments, but not at all times, for with us there are some particular Seasons in the Year wherein it ought not to be celebrated, as in *Lent*, and on fasting Days, because the mirth and rejoycing which usually accompany Marriages are not suitable to the Humiliation and Sorrow which we ought to have at that time for our Sins, therefore our Ancestors thought it convenient to restrain the common Liberties of Marriage during those Seasons.

But I know not upon what Authority the *Almanck-makers* tells us, that Marriages are out from *Advent Sunday*, till the day after *Epiphany Sunday*; and from *Septuagesima* or the third Sunday before *Lent*, to *Low Sunday*, which is the first Sunday after *Easter* from *Rogation*, which is a Fortnight before *Whitsontide* to *Trinity Sunday*.

For the time of *Advent* was never observed in our Church as a Fast, and both the *Easter* and *Whitson* weeks are usually times of Mirth and Rejoycing.

(*a*) 2 Rol. Abr. 591.

'Tis

'Tis true, the *Banns* are ſeldom or never Publiſhed in *Lent*, yet People Marry at that time with Licenſes, and probably we are told that Marriages go out at the times abovementioned, that thoſe who intend to come in may purchaſe Diſpenſations for that purpoſe.

Modus Decimandi.

THIS is where Lands, or an yearly Penſion, or ſome Money or other thing is given to the Parſon in lieu of his Tythes, in kind ariſing in ſuch a Place; and 'tis a certain Rule that a *Modus* is not good but where ſomething is paid or done by a Layman for the benefit of the Parſon.

But it hath been a Queſtion whether 'tis good to pay part of the Tythes for all of the *ſame kind*, as to pay an Apple for the Tythes of all his Apples; 'tis certainly wrong to pa y the *tenth Sheafe* in ſatisfaction of Tythes of all Corn which ſhall grow on ſuch a number of Acres (*e*), becauſe this puts it into the power of the Poſſeſſor to pay what he thinks fit, that is, to make as much into Sheaves as he pleaſeth.

A *Modus Decimandi* doth ariſe either by *Compoſition*, *Cuſtom* or *Preſcription*.

Compoſitions were uſually entred in the Biſhops Regiſter, eſpecially if made on a good and valuable conſideration, and being conſtantly paid it became a Cuſtom, and tho' there is no manner of proportion between the valuation of things at the time when ſuch compoſitions were firſt made and now, and by conſequence no reaſon to continue them, yet the prevalency of a Cuſtom is ſo great, that it hath got the better of Reaſon, and is allowed for Law at this day.

Theſe *Compoſitions* are ſuppoſed to be the chief Foundation of every *Modus*, but the true cauſe of them hath been the negligence of the Clergy themſelves to ſuffer an agreement of their Predeceſſors to grow into a Cuſtom.

But ſince the Statute 13 *Eliz. cap.* 10. no ſuch Compoſition can be made, becauſe all Grants of Spiritual Perſons which are binding, are reſtrained to 21 Years or three Lives.

Before the Statute, a Compoſition to be Diſcharged of all Tythes had been good, without any manner of recompence to the Parſon; yet my Lord *Hobert* (*f*) tells us, that when it run out into a preſcription it died, that is, where a Layman preſcribed in *non Decimando*, which he cannot do; and therefore by the policy of the Law ſuch Preſcriptions, tho' they ſtreng-

(*e*) 1 Add. 199. (*f*) Hob. 297.

then

then all Mens Titles, yet in this caſe they fail, becauſe 'tis in favour of the Church; for tho' the Law allows that a Layman may be diſcharged by a Grant where it appears, yet it will not allow it in Preſcriptions where the original cauſe of ſuch Diſcharge doth not appear.

(2.) Cuſtom is of larger extent than Preſcription, for it muſt be alledged in a Province, County, City or Hundred, and the manner of Pleading it is, *viz.* that in ſuch a County there is, and time out of Memory hath been, ſuch a Cuſtom uſed aud approved therein, that is to ſay, *&c.* and ſo ſet forth the Cuſtom.

(3.) Preſcription is called by Sir *Symon Degg*, the younger Daughter of Cuſtom, and is always confined to a certain Perſon, Houſe or Land, and in Pleading it muſt be alledged that ſuch a Perſon, and all thoſe whoſe Eſtate he hath in ſuch Land have, time out of mind, paid ſo much Yearly, *&c.* in full ſatisfaction of all Tythes ariſing on thoſe Lands.

So that we ſee ſomethiug muſt be paid to the Parſon, for 'tis an unreaſonable and void Preſcription where nothing is allowed to him; as for Inſtance, if a (*g*) Man ſhould preſcribe to be diſcharged of Tythes for finding Straw to Thatch the Body of the Church, this is not a good Preſcription, becauſe there is no recompence to the Parſon.

So where a Preſcription is to pay the tenth Part *abſq. viſu & tactu* of the nine Parts, by the Parſon (*h*), this is unreaſonable, becauſe a Man ought not to divide for himſelf without the view of the Parſon or his Servant, and then to make choice of his own Diviſion.

'Tis likewiſe unreaſonable for a Man to preſcribe to be Diſcharged of Tythes of dry Cattle, in conſideration of paying Tythes to the Parſon (*i*) which are due to him for other things, as to pay ſo much Money for every Cow and Calf, and ſo much for every Milch Cow, in ſatisfaction of all Tythes for Cows (*k*), and for the *Herbage and Paſture* of the Land in ſuch a Pariſh is not good, becauſe Tythes for Cowes can be no manner of ſatisfaction or recompence for the Tythes of *Herbage*, *&c.*

'Tis likewiſe to be obſerved, that the Perſon who pleads a Preſcription muſt bring his Caſe within the compaſs of it (*l*); as if a Man preſcribes to pay nothing for Batren Cattle, reared for the *Plow*, he muſt alledge that the Cattle were reared for that purpoſe.

(*g*) 1 Rol. Abr. 647. March. 67. Cro. Eliz. 276. (*h*) Hob. 107. 1 Rol. Abr. 648. (*i*) Cro. Eliz. 786. (*k*) 2 Lut. 1052. (*l*) 1 Rol. Rep. 62.

The

The payment muſt alſo conſiſt in ſomething that is durable and certain, becauſe the Tythe it ſelf is a certain Inheritance, (*m*) and therefore 'tis unreaſonable it ſhould be extinguiſhed by any recompence of leſs value which is not durable.

But the Civil and Eccleſiaſtical Laws differ from the Common Law in caſes of Cuſtom and Preſcription, for they allow an uſage for forty Years, to be good Evidence to ſupport a Cuſtom; but by the Common Law it muſt be beyond the memory of Man, and it muſt be conſtant and without any Interruption. Yet a diſturbance for 10 or 20 Years ſhall not deſtroy ſuch a Cuſtom, for 'tis only a ſuſpenſion of the Right for a time.

By a long and peaceable Poſſeſſion all manner of property is transferred without any other Title or Delivery, becauſe 'tis for the Intereſt of mankind that all demands of Right ſhould be limited to a certain time, therefore a Cuſtom beyond time of Memory obtains the force of a Law, for no Proof can be brought when it was otherwiſe.

I have been the longer in deſcribing Cuſtoms and Preſcriptions, that I might ſhew there may be a lawful Exemption to pay leſs than the true value of the Tythe, that is, to ſhew the Parſon hath a Feather who ought to have the Gooſe.

I grant that thoſe who are of opinion that Tythes are due by Divine Right oppoſe all manner of Cuſtoms to leſſen the tenth Part, for they ſay no Cuſtom can be good againſt the poſitive Law of God.

But the Common Law diſtinguiſhes in this caſe, by allowing Tythes to be due *Jure Divino Secundum quid*, that is, in reſpect to the maintenance of the Clergy, but not *quoad decimam partem*, and therefore it allows a *Modus* where there is enough beſides to ſupport the Parſon.

And tho' we ſometimes find in our Books, that the Eccleſiaſtical Courts will not allow a *Modus*, yet the Canoniſts and Civilians in conformity to our Law, do allow compoſitions for Tythes made with Laymen, ſo as they have the Biſhop's conſent; ſome Compoſitions have been made without ſuch conſent, and held good for what is paſt; but the Revenues of the Church being diminiſhed by this means, it was thought requiſite that no Compoſition ſhould be made *ſine judicis Auctoritate*, which implies that by his leave it might.

A *Modus* thus qualified was allowed by the Eccleſiaſtical Law, and a Preſcription to maintain it is only to ſupply the defect which may happen in the proof of the Compoſition, which being made time out of memory may be loſt.

(*m*) Hob. 40.

Theſe Preſcriptions are likewiſe allowed by the Statute Law, for it hath been enacted, That no Perſon ſhall be Sued for Tythes of Lands (*n*) which by Preſcription are not chargeable with the payment thereof, or which are diſcharged by any real Compoſition.

I ſhall now mention who may not preſcribe in *non Decimando*, and who may.

Who may not Preſcribe in non Decimando, and who may.

'Tis generally true, that a Layman cannot preſcribe in *non Decimando*, and to pay nothing in lieu of Tythes, becauſe none but an Eccleſiaſtical Perſon is capable of having Tythes in his own Right.

But a Layman may lay a Preſcription in a Spiritual Perſon, and ſo derive a Title under him, as for Inſtance, if ſuch Spiritual Perſon Leaſe his Lands to a Layman, he may preſcribe under the Parſon, and derive a Title from him.

So if an Abbot had been ſeiſed of Land diſcharged of Tythes, he who is now Owner or Farmer of that Land may preſcribe in *non Decimando*, by virtue of the Statute 2 *Edw.* 6. (*o*) which enacts, that none ſhall pay Tythes otherwiſe than they were paid 40 Years before.

But tho' a Spiritual Perſon (*p*) may preſcribe in *non Decimando* both for himſelf and his Tenants, it may be a Queſtion whether he can preſcribe for his *Copyhold Tenants*, becauſe in ſuch caſe there muſt be two concurrent Preſcriptions, one for the *Copyhold*, and the other in *non Decimando*, but it hath been adjudged that thoſe Preſcriptions may ſtand together; and ſtill it is a Queſtion whether a Spiritual Perſon can preſcribe in ſuch manner for a *Freeholder*, tho' he may for his Tenants for Life, for Years, or at Will.

The Churchwarden of a Pariſh cannot preſcribe in *non Decimando*, for ſuch Lands which are given to them as a Corporation for the repairing the Church, and the reaſon is, becauſe they are not Spiritual Perſons.

A Spiritual Corporation may preſcribe in that manner, but when 'tis diſſolved the Preſcription fails, as for Inſtance, a Man preſcribed that ſuch an Abbot and his Predeceſſor held Lands diſcharged of Tythes, which Lands came to the Crown by the Diſſolution of the Abby, and ſo derived a Title from thence, the Grantee ſhall never have any advantage by this Preſcription without the help of the Statute, (*q*) becauſe the diſcharge of Tythes ſhall be intended to be Originally made

(*n*) 2 Edw. 6. cap. 13. (*o*) Moor. 219. (*p*) 1 Rol. Abr. 653. (*q*) 31 H. 8. cap.

made

upon the account of ſome Perſonal priviledge granted to the Abbot and his Predeceſſors, (r) and not upon any real Compoſition.

But by the help of the Statute ſuch Lands are diſcharged of Tythes if they paid none before they came to the Crown, and in ſuch Caſe a Layman may preſcribe in *non Decimando*.

So he may be freed from the payment of Tythes of ſome particular thing by the cuſtom of the Pariſh, County or Hundred where he Lives, he may likewiſe alledge a Cuſtom in two Hundreds, (ſ) that if any common Baker dwelling there ſets up a Mill to grind Corn for the ſupport of himſelf, and to ſell to the Inhabitants there, by reaſon whereof the Parſon hath a greater encreaſe of Tythes, *viz.* The Tythes of the Land and of the Manual Occapations of ſuch Perſons who live in the ſaid Hundreds, and who are maintained with the Corn ground at ſuch Mill, this is good to diſcharge him of the Tythes of that Mill, and he may preſcribe to be diſcharged accordingly.

Copyholders of Inheritance held of a Mannor, of which a Biſhop is the Lord, may likewiſe preſcribe to be diſcharged of Tythes, becauſe their Tenements are parcel of his Demeſnes, and this diſcharge might commence upon a real Compoſition for the whole Mannor.

But in all theſe Caſes of Preſcription, 'tis only to be diſcharged of a particular ſort of Tythes; for a Preſcription in *non Decimando* generally, would undo the Clergy, and therefore 'tis not good where there is not ſufficient left for their Maintenance.

A late learned Prelate, *viz.* the Biſhop of *Worceſter*, treating of this matter, tells us, That a diſtinction hath been found out which may be of dangerous conſequence, *viz.* That though a Layman cannot preſcribe in *non Decimando*, yet he may preſcribe to have *decimam Garbam*, for that is not *decima Garbarum*, and this he may have as a profit *Apprendre*, and he finds fault with my Lord *Coke* for reporting it as Law in the Biſhop of *Wincheſter*'s Caſe, (t) that a Lord of a Mannor may have *Tythes as appurtenant to his Mannor*; and tells us what my Lord *Hobert*'s opinion was of that famous Reporter, (as he calls him,) that ſometimes he hath obtruded his own Judgment as the reſolution of the Court, which hath been ſet in a clearer Light by the contemporary Lawyers, who have Reported the ſame Caſes.

(r) 1 Rol. Abr. 654. (ſ) 1 Rol. Abr. 654. (t) 2 Rep. 45.

If this was true, it muſt ſhake the Authority of my Lord *Coke*'s Reports; but what ever my Lord *Hobert*'s opinion was, in reference to this Matter, he who carefully reads the Biſhop of *Wincheſter*'s Caſe will find the Biſhop of *Worceſter* miſtaken; for 'tis not reported there that a Lord of a Mannor may have Tythes appurtenant to it, but quite contrary, *viz.* That he cannot preſcribe generally to have Tythes belonging to it, without ſome ſpecial Matter ſhewn, becauſe Tythes which are Spiritual and of Divine Right, cannot be parcel, or appurtenant to a Temporal Inheritance; theſe are my Lord *Coke*'s words.

The like, he tells us, was reſolved in *Pigott* and *Hernes*'s Caſe, *viz.* upon (*u*) Special Matter therein alledged that one might have Tythes as appurtenant to a Mannor, now the Special Matter was thus, *viz.* in conſideration of the payment of an yearly Penſion to the Parſon, in ſatisfaction of all Tythes ariſing yearly in the Pariſh, *&c.* the Lord of a Manor preſcribed to have *decimam Garbam & cumulum granorum* yearly ariſing there.

Juſtice *Croke* and Serjeant *Moor*, who report the ſame Caſe, agree with my Lord *Cook* in it, *viz.* that this was not a Preſcription in *non Decimando* by a Layman, but a *Modus* of ſix Pound *per Annum*, which was the Penſion, and not ſix Shillings, as the Biſhop of *Worceſter* miſtakes it, and this was to be in ſatisfaction of all Tythes, which Preſcription was held good, and my Lord *Coke* gives the reaſon for it, becauſe it might be intended that the Lord of the Mannor was ſeized of the whole, before any Tenancies were divided out of it, and tho' as a Layman he could have no infeodation of Tythes, ſo as to create a perpetual Right to them, yet they might have the Inheritance thereof by a Grant or Compoſition, and 'tis probable it might be by one of thoſe ways, becauſe there was an expreſs recompence to the Parſon, *viz.* a Penſion of ſix Pounds *per Annum*.

Neither can I ſee the dangerous conſequence of the aforeſaid diſtinction (as 'tis called) for the Archbiſhop of *Worceſter* himſelf tells us, (*x*) that *Decima garba* and *Decima garbarum* is the ſame thing in a Compoſition for Tythes, and Quotes an Authority to prove it, (*y*) and if 'tis the ſame thing there can be no danger in the diſtinction.

But tho' Churchwardens cannot preſcribe in *non Decimando*, yet a Pariſh may in *modo Decimandi*, as to pay their Tythes in Graſs-Cocks, (*z*) tho' generally it ought to be made into Hey

(*u*) Cro. Eliz. 599. Moor. 483. (*x*) Stillingfleet 220. (*y*) Moor. 37
(*z*) 1 Rol. Abr. 247.

but

but a ſingle Pariſhioner cannot, becauſe, as to his part, 'tis a Preſcription *in non Decimando*.

He may preſcribe to pay the tenth Acre of Graſs ſtanding, ſo in (*a*) conſideration that he hath made the firſt Moath into Hay to be diſcharged of Tithes of the latter Moath.

So in conſideration of making the Graſs into Hay, (*b*) he may preſcribe to be diſcharged of the Tithes of the Paſture of theſe Lands.

So in conſideration that the Parſon and his Predeceſſors * have been ſeiſed in fee of a Meadow in ſuch a Vill, and had taken the Profits thereof in full ſatisfaction and diſcharge of Tithe-Hay ariſing in the ſaid Vill.

How it may be diſcharged.

If the Nature of the thing is altered for which a *Modus* was paid, this deſtroys the *Modus* it ſelf, as if there is a Preſcription to pay ſo much for Hay and Graſs (*c*) yearly ariſing in forty Acres of Land, and this is afterwards converted into a Hop-garden or Plowed the *Modus* is gone, (*d*) but yet when 'tis turned into a Meadow again the *Modus* ſhall revive.

So a *Modus* to pay 6 *s.* 8 *d.* for all manner of *Tithe* (*e*) of a Park, which is afterwards diſparked and converted into Tillage, the *Modus* is deſtroyed, but if 'tis to pay 2 *s.* for *ſo many Acres* (*f*) in the Park, and alſo the Shoulder of every third Deer killed there, tho' 'tis afterwards diſparked, the *Modus* ſhall continue, becauſe the Preſcription relates to the *Soil* and not to the *Park*.

'Tis true, this was my Lord *Hobert*'s Opinion, and the Court was divided upon it, but in the caſe of *Bedingfeild* and *Frake*, which is Reported by Serjeant *Moor*, 'tis ſaid, that Tithes ſhall be paid in kind, and not the two Shillings only, becauſe the Preſcription as to the Veniſon is gone, and by conſequence the whole *Modus* falls with it.

But my Lord *Hobert* did not alter his Opinion, for he held that the payment of two Shillings was certain, and could not be diſcharged by the diſparking, that the Veniſon was only caſual, for if no Deer was killed the Parſon could have no Veniſon, and that it could not fall into a *non Decimando*, becauſe of the payment of 2 *s. per Annum*.

If there is a *Modus* (*a*) to pay a ſum of Money for Tithe of a certain piece of Ground which is afterwards built on,

(*a*) Hob. 328. 1 Roll. Abr. 648. (*b*) 1 Roll. Abr. 649. * Idem. (*c*) 1 Roll. Abr. 551. (*d*) Godb. 194. (*e*) 1 Roll. Abr. 651. (*f*) 1 Roll. Rep. 129. Hob. 39. Moor 863. (*a*) Hob. 11.

and converted into Gardens, the *Modus* continues, becauſe it may reaſonably be intended that ſuch a form of Tithing was uſed for the Land it ſelf before the Houſes were built.

If Lands are given to a Parſon (*b*) in ſatisfaction of Tithes and he is evicted, the Tithes in Kind ſhall revive, but if 'tis let to Farm, and the Leſſee pays the Tithes in Kind, that ſhall not deſtroy the Preſcription.

In what Court to be recovered.

A *Modus* is in nature of Tithes, and therefore the Clergy may Sue for it in the Spiritual Court, and the Courts at Law will not prohibit ſuch Suits, becauſe the Eccleſiaſtical Court had the original Cognizance of the matter.

But if the Defendant ſhould ſuggeſt that the Parſon had miſtaken the *Modus* and he ſhould ſhew another, in ſuch caſe a Prohibition ſhall go, becauſe otherwiſe the Spiritual Court would try a Cuſtom, and that might be prejudicial to a Man's Inheritance, for their Law differs from the Common Law both in the nature of a Preſcription and the Proof, as for inſtance, an Uſage for term of Yers is a good Cuſtom in their Law, and it allows no Proof but by two Witneſſes, but at Common Law there can be no Preſcription within time of Memory, and the proof of a Fact by one Witneſs is held ſufficient.

Now if the Plaintiff ſhould Declare upon ſuch a Prohibition (*c*), and the Defendant Pleads, and Iſſue is taken upon it, and the Jury ſhould find a *Modus* different from what is pleaded: No Conſultation ſhall go, becauſe it appears by the Verdict, that he ought not to ſue for the Tithes in Kind.

But if the Defendant pleads Payment, that ſhall be tried in the Spiritual Court (*d*), and no Prohibiton ſhall go.

So if a Vicar Libels for Tithes, and the Defendant pleads, that he paid a *Modus* (*e*) to the Parſon, a Prohibition ſhall go for a Controverſie between Spiritual Perſons ſhall never turn a Pariſhioner *ad aliud examen*.

'Tis true, there is a Caſe in *Bulſtrode* where it was adjudged otherwiſe, and the reaſon was, becauſe the *Modus* can never come in queſtion upon ſuch a Plea but the right of Tithes, *viz.* to whom they ſhould be paid, whether to the Parſon or to the Vicar, and that ſhall be tried in the Spiritual Court.

Laſtly, What ſhall be a good *Modus* and what not, you may ſee under the reſpective titheable things in Title Tithes.

(*b*) 1 Roll. Rep. 176. (*c*) Hob. 192, 300, 301. (*d*) 2 Roll. Abr. 305. (*e*) Tid. 332. 2 Bulſt. 157.

Monks

Monks and *Monaſteries.*

THE firſt Monks were in the Eaſtern Church, (*f*) and they began in the time of *Diocleſian*'s Perſecution, not long afterwards they were brought into *Europe*, and it was *Athanaſius* who brought them to *Rome*.

But the Monks of thoſe times were meer Laymen, (*g*) they had no Office in the Church, but were only ſuch who retired from the Employments of the World for Study and Devotion, and the place where ſeveral ſuch Men lived together was called a *Monaſtery*.

Euſebius of *Vercelles* (*h*) was the firſt who brought them into Holy Orders, and St. *Martin*, who came from *Millan*, was the firſt who brought the form of a Monaſtick Life into *France*, and he built a Monaſtery for that purpoſe about two Miles from *Tours* of which place he was Biſhop.

Sulpitius Severus, who wrote his Life informs us, that his Monks encreaſed ſo faſt, that there were almoſt 2000 of them at his Funeral, and 'tis probable that out of ſuch a great number ſome of them might come hither, for here were no Monks before the *Saxons* but St. *Martin*'s Monks, and thoſe few Monaſteries which were here in the time of the *Britains* were dedicated to him, and ſo they were in *Ireland*, for St. *Martin* was Uncle to St. *Patrick*, and gave him the Habit of a Monk.

In the City of *Canterbury* there was an ancient Church dedicated to this Saint *Martin*, it was built by the *Romans*, and rebuilt by St. *Auguſtine*, and by him dedicated to *Chriſt*, whith is the Cathedral at this time, he likewiſe built a Monaſtery there, which is now a Church, and called by his Name, and he being of the Order of St. *Benedict*, (*i*) was the firſt who brought theſe Monks there, and placed them in his own Foundations in the year 615.

'Tis true, there have been ſome Men who denied the *Benedictine* Order to be ſo long in *England*; and ſome learned Perſons beyond-Sea have affirmed, that all the ancient *Engliſh* Monks were of the Order of St. *Equitus* or of ſome other Order, which occaſioned the *Benedictines* to write to our Antiquaries Mr. *Cambden*, Mr. *Selden*, Sir *Robert Cotton*, and to Sir *Henry Spelman*, to know the truth of this matter, and they all certified under their Hands, that there was no ſuch Order as that

(*f*) Soſom. Hiſt. Eccleſ. 3. 14. (*g*) Still. Orig. Brit. 185. (*h*) Baron Annall. 340. N. 7. (*i*) 1 Tyrr. 167.

of St. *Equitus*, and that amongſt the *Engliſh Saxons* there were only two Orders of Monks, of which one followed the Rights of the *Ægyptian* Monks, and the other were *Benedictines*, who came hither with St. *Auſtin*.

Theſe Men by a voluntary retirement from the World, and ſpending their time in religious Exerciſes, ſuch as Prayer and Faſting, *&c.* had encreaſed their Houſes to a conſiderable number, in ſo much that *Trithemius* tells us there were more then 15000 Monaſteris of that Order in leſs time then 1000 Years after its firſt Inſtitution, and *Volateran* accounted in his time 24 Popes of this Order, 200 Cardinals, 1600 Archbiſhops, 4000 Biſhops, 15700 Famous Abbots, 156000 Canonized Saints.

With us here the moſt remarkable Monaſtery was that at *Bangor*, of which *Pelagius* was Abbot, that there were above 2000 Monks in that Monaſtery, and that when any of them in this or other religious Houſes was found capable of Holy Orders by his Superiours, then he was Ordained not by the Abbot but by the Biſhop.

In this Monaſtery Men were educated both in Religion and Learning, more like the Education now in our Colleges then in the ancient *Ægyptian* Monaſteries where they laboured as well as prayed, and ſo did the *Benedictines* at the firſt inſtitution of their Order, for St. *Benedict* himſelf diſpiſed Learning, and took no care about it, but that his Monks might be diſtinguiſhed by Prayer, Faſting and *hard Labour*.

And ſo early as the days of *Ethelfrid* King of *Northumberland*, (*k*) he ſaw two thouſand Monks praying in the Field for the ſucceſs of the *Britains* againſt him, who thereupon told his Army that thoſe Men fought by Prayers, but they with the Sword,, and therefore bid them fall on, which they did, and killed all thoſe Monks in a Field near *Cheſter*.

I only mention this to ſhew that the Monks in thoſe times were not Men of Learning but wholly devoted to Prayers, 'tis true, by the Conſtitutions of *Charles* the Great, which were made above 200 Years before that time, Schools were appointed for inſtructing young Men both in Monaſteries and Cathedrals, which gave the firſt encouragement to Learning, and probably there might be ſome of thoſe Monks who applied themſelves to Studies, tho' very few, however by this way of Living, both Religion and Learning were thought to be advanced, and the Monks of that Age were not only Divines, but Hiſtorians, and being brought into Holy Orders,

(*k*) Selden on Polyolb. 186.

and

and living under certain Rules, they were ſo far encouraged in that courſe of Life, that by ſeveral Exemptions they were almoſt freed from the Juriſdiction of the Ordinary, for they were not ſubject to him out of Duty but Choice, as having liberty to chooſe what Biſhop they would to Ordain them; but when once they made their Election they were to continue ſubject to him during his life.

In a little time they came to be diſtinct, not only from the Laiety, but from the Secular Clergy, for, 'tis true, they never medled with the cure of Souls, but they buſied themſelves in Parochial Offices, ſuch as Preaching, Baptizing, viſiting the Sick, *&c.* but this was by way of intruſion upon the Rights of the Secular Clergy, and therefore, by the Canons of the Church they were prohibited in thoſe matters.

And tho' they were not an Eccleſiaſtical Body of Men, yet they received Tithes, which were originally given for the Maintenance of the Parochial Clergy and the Service of the Church, and it was a reproach to that Age, that the payment thereof was ſo much neglected during the time the *Normans* ruled here, for then the Poor Secular Clergy had only a third part of the Tithes, the Monks had the reſt, and not only ſo, but ſeveral of the Nobility having built Monaſteries, appropriated all the Tithes to them, which the Monks got the Pope to Confirm.

It was requiſite upon ſuch Confirmations for the Biſhop to take care that a competent Maintenance ſhould be ſettled upon the Parochial Clergy, but the Monks were ſo much favoured by the Biſhops in thoſe days, that the Clergy had but a very poor Subſiſtence, and this occaſioned honeſt Pope *Alexander* the 3d to reprove the Biſhops, and to decree that the Parochial Prieſts ſhould have a ſufficient Maintenance, which the Monks would be ſure to leſſen as they ſaw occaſion, and therefore another Decretal was made, that their Maintenance ſhould not be diminiſhed without the Biſhop's conſent; and that all Cuſtoms and Priviledges by which the Monks held the appropriated Tithes ſhould be void where the Secular Clergy had not a competent ſubſiſtence.

'Tis obſervable that in moſt of theſe Appropriators to Monaſteries, the Right of Preſentation was in the Monaſtick Body, but the Biſhop had Power to refuſe their Clerk, unleſs they would conſent he ſhould have ſuch a ſufficient Maintenance as he ſhould think fit.

This made them ſo ſullen, that they would not preſent upon an Avoidance, which occaſioned the making another Decretal, *viz.* that if they neglected, the Biſhop ſhould have Power to Collate.

Before

Before the Monks became Rich by these Tithes and other Endowments, they had a competent share of Learning, and their Monasteries were the only Universities where the liberal Arts were taught, and therefore the best Men retired thither, for the Nobility as well as private Persons, choose rather to make themselves and their Children Monks then to educate them in a Military Life, and such was the Superstition of that Age, that if a Prince was very Vitious, or had committed any barbarous act of Cruelty, it was accounted a sufficient Attonement for his Crimes to build a Monastery.

King *Edgar*, who was guilty of as great excesses both in Lust and Cruelty as any of his Predecessors was by the Monkish Writers applauded for a Wise and Religious Prince, because he built forty seven Monasteries, (*l*) and had he lived, would have built three more to make up Fifty, the number of *Jubilee*; and tho' he invaded their Priviledges (for he took a Nun out of the Cloyster at *Wilton* and debauched her) yet becaus he turned the Secular Clergy out of their Benefices, upon pretence that they were married, and put Regulars into their Livings, therefore he was esteemed a Saint.

From the Reign of King *Edgar* to the time of *H.* 8. Monkery had been encreasing here, it was settled in some of the great Cathedrals, but 'tis certain that the Monks had the greatest Revenue of the Church in their Power, this made them Idle and Lascivious, and by consequence dispised by good and learned Men, and they on the contrary disparaged all manner of learning as the Foundation of Heresies and other Mischiefs.

They were called in the Language of that time lubberly Sots, and the old Poets give us their Character in the Discription of Sloath, and particularly *Robert de Langland*, whose Verses, for the Curiosity of them, I shall transcribe.

I have been Priest and Parson passing thirty Winter,
Yet can I neither sol sane *Sing ne Saints lives read;*
But I can find in a Field or in a Furlong an Hare
Better then in Beatus vir *or in* Beati omnes.

This Ignorance and Vices of the Monks was sufficiently expose by *Erasmus* and others, and our King *H.* 8. who was designed for the Archbishoprick of *Canterbury*, and for that purpose being bread a Scholar, did naturally love Learning, and by consequence must have a very mean Opinion of those illiterate Men who enjoyed great Revenues, and lived in all manner of Sensualities, insomuch that at the general

(*l*) B. H. R. 1 Ps. 22.

Visitation

Viſitation in his Reign there were ſuch ſhameful Diſcoveries of the Incontinency and Sodomy of the Monks and Fryers, that in the *Priory* of the *Benedictines at Canterbury*, there was evident proof of nine *Sodomites*, and of fifteen more in *Battel Abby in Suſſex*, and ſo in many other Monaſteries and Priories, beſides married and ſingle Women whom they debauched, ſo that upon the Viſitation of about ſix hundred of their Convents, togeather with the *Mendicants* in this Kingdom: A Writer (*m*) in thoſe days declared, that he would leave it to the Reader to gueſs how many Baſtards they begot every Year for the Laity to maintain.

Therefore ſince learning was no longer to be found in thoſe places where all ſorts of Vice and Debaucheries did abound, that Wiſe King encouraged *Cardinal Woolſey* to build two Colleges, which he did, *viz.* one at *Oxford* and the other at *Ipſwich* where he was born, and that theſe Colleges might be ſufficiently Endowed, it was thought as juſtifiable in that Age to ſuppreſs ſome Monaſteries, and annex their Revenues to thoſe new built Foundations, as it was in the foregoing Ages to turn out the poor Secular Clergy, and to place the Regulars in their Benefices, for the ſame Eſtate was ſtill employed to Religious Purpoſes, and this was the beginning of the ſuppreſſion of ſome Monaſteries, and the total diſſolution of them followed in that Reign.

The Names of Monaſteries and Priories.	In what Counties	When Founded. *An.*	Of what Order.	Of what value *per An.*		
Abington Ab.	*Berks*	821	*Benedictines*	1876	00	00
Abbotbury	*Dorſet*	1016	*Benedictines*	390	19	02
St. *Albans* Ab.	*Hertford*	793	*Benedictines*	413	14	11
Ambresburg A.	*Wilts*	1177	*Benedictines*	494	15	02
St. *Andrews* Pr.	*Northam.*	1067	*Cluni*	263	7	01
Aſhrugg Coll.	*Bucks*	*Ed.* 1.	*Can.* St. *Auſtin.*	416	16	04
Barndney Ab.	*Lincoln*	712	*Benedictines*	366	6	01
Barnewelt pr.	*Kent*	*H.* 1.	*Can.* St. *Auſtin*	256	11	10
Bartholomew	*Smithfeild*	1102	*Can.* St. *Auſtin*	653	15	00
Bath Abbey	*Somerſet*	*H.* 3.	*Benedictines*	617	2	08
Berking Ab.	*Eſſex*	680	*Benedictines*	862	12	02
Bellavalla pr.	*Nottingh.*	16 *Ed.* 3.	*Carthuſians*	227	8	00
Belland Ab.	*York*	1134	*Ceſtertians*	238	9	04
Bermondſey Ab.	*Surry*	7 *H.* 1.	*Can.* St. *Auſtin*	474	14	04
Birlington	*York*	*H.* 1.	*Can.* St. *Auſtin*	547	6	11

(*m*) H. Stephen. 1 cap. 21. Selden, on Polyalb. 187.

The

The Names of Monasteries and Priories.	In what Counties	When Founded, *An.*	Of what Order,	Of what vallue.
Bodwin Priory	*Cornwall*	936	Can. St. *Aust.*	270 00 11
Bolton in *Craven* pr.	*York*	*H.* 1.	Can. St. *Austin*	212 13 04
Bordesly Ab.	*Worcester*	1138	*Cistertians*	388 09 10
Boxley Ab.	*Kent*	1144	*Cistertians*	204 04 11
Bradstock pr.	*Wilts*	*T. Conq.*	Can. St. *Austin*	212 19 03
Brewton Ab.	*Somerset*	*T. Conq.*	Can. St. *Austin*	439 06 08
Bristol Ab.	*Glouceſt.*	*H.* 1.	Can. St. *Austin*	670 13 11
Buckland pr.	*Somerset*	*Ed.* 1.	*Cistertians*	223 07 04
Buckfast Ab.	*Devon*	*H.* 2.	*Cistertians*	466 11 02
Burton on *Trent* Ab.	*Stafford*	*K. Edre.*	*Benedictines*	267 14 03
Busleſham Ab.	*Berks*	13 *Ed.* 3.	Can. St. *Austin*	285 00 00
Butley Ab.	*Suffolk*	1171	Can. St. *Austin*	318 17 02
Carliſle pr.	*Cumberl.*	*W. Rufus*	Can. St. *Austin*	418 03 04
Caſtle Ave Ab.	*Norfolk*	1092	*Clun*	306 11 04
Cerne Ab.	*Dorſet*	*K. Edg.*	*Benedictines*	515 17 10
Charter-houſe		1372	*Carthuſians*	726 02 07
Chertſey Ab.	*Surry*	666	*Benedictines*	659 10 08
Chickſand pr.	*Bedford*	*W.* 2.	*White Canons*	212 03 05
Cirenceſter Ab.	*Glouceſter*	*H.* 1.	Can. St. *Austin*	1051 07 01
St. *Clare.*	wt. *Algat*	1292		1418 08 02
Clarkenwell pr.		*K. Step.*	*Benedictines*	262 19 00
Colcheſter Ab.	*Eſſex*	H. 1.	Can. St. *Austin*	523 17 00
Comb. Ab.	*Warwick.*	*K. Step.*	*Cistertians*	371 15 01
Combermere Ab.	*Cheſhire*	1134	*Cistertians*	225 09 07
St. *Croſs* Ab.	*Stafford*	1153	*Cistertians*	227 05 00
Croyland Ab.	*Lincoln*	716	*Benedictines*	1803 15 01
Croxden Ab.	*Liceſter*	*R.* 1.	*Præmons*	385 00 10
Croxden Ab.	*Stafford*		*Cistertians*	
St. *Cuthbert* Ab.	*Durham*	842	*Benedictins*	523 17 00
Darbey Ab.	*Derbyſh.*	H. 2.	Can. St. *Austin*	258 14 05
Dertferd Ab.	*Kent*	46 *E.* 3.	Can. St. *Austin*	380 00 00
Dinkswel Ab.	*Devon*	1201	*Cistertians*	294 18 06
Dorcheſter Ab.	*Oxon*	635	Can. St. *Austin*	219 12 00
Dunſtable Ab.	*Bedford*	H. 1.	Can. St. *Austin*	344 13 03
Edington pr.	*Wilts*	1352	Can. St. *Austin*	442 09 07
Edmondsbury A.	*Suffolk*	1020	*Benedictines*	1659 13 11
Finſham Ab.	*Oxon*	*K. Eth.*	*Benedictines*	441 12 02
Elmeſton Ab.	*Bedford*	*W.* 1.	*Benedictines*	284 12 11
Epworth	*Lincoln*	*W. R.* 2	*Carthus Monks*	237 15 02

The

The Names of Monasteries and Priories	In what Counties	When Founded, *An.*	Of what Order.	Of what Vallue.
Fair-place Ab.	*Hamps*	1204	*Cistertians*	326 13 02
Farley	*VVilts*	1125	*Clun*	217 00 04
Feversham Ab.	*Kent*	1147	*Clun*	286 12 06
Ford Ab.	*Devon*	1133	*Cistertians*	374 10 06
Fountain Ab.	*York*	1132	*Cistertians*	998 06 08
Furnes Ab.	*Lincoln*	1127	*Cistertians*	805 16 05
St. *German* Ab.	*Cornwall*	*Athelst.*	*Can* St *Austin*	243 08 00
Glassenburg Ab.	*Somerset*	300	*Benedictines*	3311 07 04
Glocester Ab.	*Glocestr.*	680	*Benedictines*	1946 00 00
Gisburn Ab.	*York*	K. *Step.*	*Can* St *Austin*	628 03 04
Godstow Ab.	*Oxon*	K. *Step.*	*Benedictines*	294 05 10
Hales Ab.	*Glocest.*	1246	*Cistertians*	257 07 08
Hales-Owen Ab	*VVorcest*	K. *John*	*Præm.*	282 13 04
Hales-Owen Ab	*Salop*	K. *John*	*Præm*	337 15 06
Haghmond Ab.	*Salop*	1100	*Can* St *Austin*	259 13 07
Hertland Ab.	*Devon*	*H.* 2	*Cistertians*	294 18 06
Hide Ab.	*Hants*	K. *Aefr.*	*Benedictine s*	865 18 00
Hinton pr.	*Somerset*	*H.* 3	*Carthusians*	248 19 02
Holmcoltron Ab.	*Cumberla.*	1135	*Cistertians*	427 19 03
Holynell	*Lond.* &c.	1318	*Black-Monks*	347 15 06
Hulme Ab.	*Norfolk*	K. *Canut*	*Benedictines*	583 17 00
Jervall Ab.	*York*	K. *Steph.*	*Cistertians*	234 18 05
John of Jerusal.		*H.* 1		2385 12 08
Ixworth pr.	*Suffolk*	*Temp.*	*Con Can* St *Aust.*	280 09 05
Keynsham Ab.	*Somerset*	H. 1	*Can* St *Austin*	419 14 03
Kennelworth Ab	*VVawick*	H. 1	*Can* St *Austin*	538 19 00
Kingswood	*Glocester*	680	*Benedictines*	244 11 02
Kirkham Ab.	*York*	H. 1	*Can* St *Austin*	239 09 04
Kirkstall Ab.	*York*	H. 1	*Cistertians*	329 02 11
Kirksted Ab.	*Lincoln*	1139	*Cistertians*	286 02 07
Lacock Ab.	*Wilts*	1232	*Can* St *Austin*	203 12 05
Lanthony Pr.	*Glocest*	1136	*Can* St *Austin*	649 19 11
Landa Ab.	*Leicest*	*W. Ruf.*	*Can* St *Austin*	399 03 03
Launceston Ab	*Cornwall*	*W.* 1.	*Can* St *Austin*	354 00 11
Ledis Pri	*Kent*	1119	*Can* St *Austin*	362 07 07
Lenton pr.	*Nottingh*	*H.* 1.	*Clun*	329 05 10
Leicester Ab.	*Leicest*	1143	*Can* St *Austin*	951 14 05
Lillyshall Ab.	*Salop*	*Adelfled*	King of *Mercia*	229 03 01
Lincoln pr.		*H.* 2.		202 05 00
London Minors.		*Ed.* 1.	*Benedictines*	318. 08 05
London-house		*Edw.* 3.	*Carthusians*	642 00 04

The

The Names of Monasteries and Priories.	In what Counties	When Founded. *An.*	Of what Order:	Of what value *per An.*
Malmesbury	*Wilts*	670	*Benedictines*	803 17 7
Malvern Ab.	*Worcester*	1083	*Benedictines*	308 1 5
St. *Mary Bish.*	Pr.	1187		478 6 6
St. *M. Ov.* Ab.		7 *H.* 1.	*Can* St *Austin*	624 6 6
St. *M. York* Ab.	*York*	*W. Ruf.*	*Benedictines*	1550 7 0
Mauling Ab.	*Kent*	K. *Edm.*	*Benedictines*	218 4 2
Maulton Ab.	*York*	K. *Steph.*		237 7 0
Melsam Ab.	*York*	1136	*Cistertians*	299 6 4
Merryval Ab.	*Warwick*	1148	*Cistertians*	254 1 8
Merton pr.	*Surrey*	1121	*Can* St *Austin*	957 19 5
St. *Mich. Hull.*	*York*	1377	*Carthusians*	231 17 3
Midleton Ab.	*Dorset*	*Ethelst.*	*Benedictines*	578 13 11
Michelney Ab.	*Somerset*	740	*Benedictines*	447 4 11
Missenden Ab.	*Bucks*	1293	*Benedictines*	261 14 6
M. Burton Ab.	*York*	1186	*Clun*	239 3 6
Mountgrace A.	*York*	1396	*Carthusians*	323 2 10
Neots Ab.	*Hunting*	*Hen.* 1.	*Benedictines*	241 11 4
Newark pr.	*Surrey*			258 11 11
Newham Ab.	*Devon*	1246	*Cistertians*	227 7 8
Newburg pr.	*York*	1145	*Can* St *Austin*	367 8 3
Newnham pr.	*Bedfordsh*	*Hen.* 1.	*Can* St *Austin*	293 5 11
Newsted pr.	*Nottingh*	*Edw.* 3.	*Can* St *Austin*	219 18 8
Noteley Ab.	*Buck*	*Hen.* 1.	*Can* St *Austin*	437 6 8
Nostell Ab.	*York*	*Hen.* 1.	*Can* St *Austin*	492 18 2
Nuneaton Mon.	*Warwick*	*Hen.* 2.	*Benedictines*	258 14 5
Osney pr.	*Oxon*	*Hen.* 1.	*Can* St *Austin*	654 10 2
Oswich Ab.	*Essex*	1120	*Can* St *Austin*	677 1 2
Oxford pr.	*Oxon*	*Ante.*	*Conquestum*	224 4 8
Peterborough A.	*North'ton*		*Benedictines*	1721 14 0
Pershore Ab.	*Worcest*	1138	*Cistertians*	643 4 3
Pipewell Ab.	*Northton*	1143	*Cistertians*	286 11 8
Plimpton Ab.	*Devon*	*Edw.* 1.	*Cistertians*	241 17 9
Pomfret Ab.	*York*	*T. Conq.*	*Clun*	337 14 8
Ramsey Ab.	*Hunting*	968	*Benedictines*	1716 12 4
Reading Ab.	*Berks*	*Hen.* 1.	*Benedictines*	1988 14 3
Reverly Ab.	*Lincoln*	1142	Can St Austin	287 2 4
Rival Ab.	*York*	1132	Cistertians	278 10 2
Rithal	*York*			351 14 6
Rochester Ab.	*Kent*	600	Benedictines	486 11 5
Rock Ab.	*York*	1147	Cistectians	224 2 5
Rumsey Ab.	*Hampsh*	907	Benedictines	293 10 10

The

The Names of Monasteries and Priories.	In what Counties	When Founded. *An.*	Of what Order.	Of what value *per An.*		
Selby Ab.	*York*	*T. Conq.*	Benedictines	729	12	10
Sempringham A	*Lincoln*	1048	Gilbortines	317	4	1
Shafton Ab.	*Dorset*	941	Benedictines	1166	8	9
Shene pr.	*Surrey*	1414	Carthusians	777	12	
Sherborne Ab.	*Dorset*	370	Benedictines	682	14	7
Shrewsbury Ab.	*Salop*	1081	Can St Austin	615	4	3
Sibeton Ab.	*Suffolk*	1150	Cistertians	250	15	7
Sion Ab.	*L. & M.*	*Hen.* 5.	Can St Austin	1731	8	4
Smithfield E. A.		34 *E.* 3.	Cistertians	602	11	10
Southwick pr.	*Hampsh*	*Hen.* 1.	Can St Austin	257	4	4
Spalling Ab.	*Lincoln*	1052	Benedictines	761	8	11
Stratford Ab.	*Essex*	511	Cistertians	511	16	3
Sulby Ab.	*North'ton*	K. *Steph*	Præm	258	8	5
Strata Florida	*Cardigan*	*T. Conq.*		1226	6	
St. *Swithins*	*Winchest*	634	Benedictines	1507	17	2
Tarrent Ab.	*Dorset*	*Hen.* 3.	Cistertians	214	7	9
Tavistock Ab.	*Devon*	961	Benedictines	902	5	7
Taunton pr.	*Somerset*	*Hen.* 1.	Can St Austin	386	8	10
Thame Ab.	*Oxon*	*Hen.* 1.	Cistertians	256	13	11
Tewxsbury Ab.	*Glouceſt*	715	Benedictines	1598	1	3
Thetford Ab.	*Norfolk*	1103	Clun	312	14	4
Thornley Ab.	*Kent*	972	Benedictines	411	12	11
Thornton Ab.	*Lincoln*	1139	Can St Austin	594	7	10
Thurgarton pr.	*Notting*	*Hen.* 1.	Can St Austin	259	9	4
Titchfeild Ab.	*Hampsh*	*Hen.* 3.	Præm	242	16	1
Tinmouth pr.	*Durham*			397	11	5
Tinmouth	*Northum.*	*A Cell to*	St Albans	511	04	1
Torre Ab.	*Devon*	*Rich.* 1.	Præmonst	369	11	0
Twineham pr.	*Hampsh*	1042	Can St Austin	326	13	2
Vale of *Holy Croſs.*	*Denbysh*	*Edw.* 1.	Ciſtectians	214	03	5
Walton Ab.	*York*	K. *Steph.*	Gilbertines	360	16	10
Waltham Ab.	*Essex*	1060	Can St Austin	900	04	3
Walden Ab.	*Essex*	1136	Benedictines	372	18	1
Walsingham A.	*Norfolk*	K. *Steph.*	Can St Austin	391	11	7
Walter pr.	*York*	*Hen.* 1.	Can St Austin	221	03	10
Warden Ab.	*Bedfordsh*	4 *Stepb.*	Ciſtertians	389	16	6
Warſon pr.	*Notting*		Can St Auſtin	239	10	5
Welbeck Ab.	*Notting*	K. *Steph.*	Can St Auſtin	249	06	8
Wenlock pr.	*Salop*	1181	Clun	401	07	0
St. *Wereburgh.*	*Cheſhire*	1095		003	05	11

The

The Names of Monasteries and Priories:	In what Counties	When Founded. *An.*	Of what Order:	Of what value *per An.*
West Deerham.	*Norfolk*	*Hen.* 2.	Præm	228 00 00
Westminster		K *Edg.*	Benedictines	3471 00 02
Westacre Ab.	*Norfolk*	*W. Ruf.*	Clun	260 13 07
Whale Ab.	*Lancast*	1172	Cistertians	331 09 01
Whitby Ab.	*York*	*T. Conq.*	Benedict	437 02 09
Whorwil Ab.	*Hampsh*	K. *Edg.*	Benedict	339 08 07
Wigmore Ab.	*Salop*	1172	Can St Austin	267 02 10
Wilton Ab.	*Wilts*	K. *Eth.*	Benedict	601 01 01
Winchcomb Ab.	*Glouceſt*	787	Benedict	391 18 02
Witham pr.	*Somerſet*	*Hen.* 2.	Carthuſians	215 15 00
Wooburn Ab.	*Bedford*	K. *John.*	Ciſtertians	391 18 02
Wymundham A.	*Norfolk*	1139	Benedictines	211 16 06

There were many other Monaſteries of leſs value, *viz.* under 200 *l. per Annum*, of which 376 were Diſſolved by Act of Parliament, *Anno* 27 *Hen.* 8. *cap.* 28. but there was a Proviſo in that Statute to enable the King to continue any of them by his Letters Patents as he ſhould think fit.

By virtue of this Proviſo ſome of the leſſer Monaſteries were continued, and ſo were not actually Diſſolved till the 31 *H.* 8. *cap.* 13. In which Act there is a Clauſe that the King ſhould have their Lands in as large and ample manner as the Governors of thoſe Monaſteries held them, in right of their Houſes, aud that ſuch of their Lands which before the Diſſolution were diſcharged of Tythes ſhould ſo continue; but Tythes were not mentioned in the firſt Statute.

Now, where any of thoſe Monaſteries were continued by virtue of the King's Letters Patents, whoſe Lands were diſcharged of Tythes by the privilege of any Order of Monks, they retained the ſame privilege at the time of the Diſſolution, by the Statute 31 *Hen.* 8. for 'tis expreſly Enacted, That they ſhould continue ſo diſcharged.

But the Lands belonging to thoſe Monaſteries which were Diſſolved by the Statute 27 *Hen.* 8. and not continued by the King's Grant, did loſe this Privilege to be diſcharged of Tythes, becauſe, immediately upon the Diſſolution, *&c.* the right of Tythes did revert to the Secular Clergy, who had been unjuſtly deprived of the ſame; and the Clauſe in the Statute 31 *H.* 8. did not extend to any Lands that were actually Diſſolved by the Act 27 *Hen.* 8.

And even when the Lands were diſcharged of payment of Tythes, it was only whilſt they were in the Owners Hands, and

and not when Leaſed to Tenants, therefore, if any were in Leaſe at the time of the Diſſolution, *&c.* when thoſe Leaſes expired the King was to hold them diſcharged of Tythes, and ſo were his Tenants, becauſe of the Prerogative of his Perſon, who could not be preſumed to be employed in Affairs of Husbandry.

His Grantees likewiſe held them diſcharged of Tythes, (*a*) but not their Tenants, for they were intended to be proper Perſons for ſuch Employments.

But none of the Lands of thoſe Religious Houſes which came to the Crown (*b*) after the Statute 31 *Hen.* 8. are exempted from payment of Tythes, becauſe they can have no benefit of that Clauſe of diſcharge which is contained in the Act; ſo that all Lands muſt pay Tythes, but only ſuch as were diſcharged from the payment thereof before the Statute 31 *H.* 8. and which came to the Crown by virtue of that Act, that being the only Statute Law which diſcharges ſuch Lands, *&c.*

Monuments.

MY Lord *Coke* tells us, That 'tis the laſt Work of Charity which we can do for the Deceaſed, to Build a Monument for him, (*c*) and that it may ſerve to ſeveral good purpoſes, *viz.* to prove his Pedigree, to ſhew when he was Buried, and to put us in mind of Mortality, and therefore 'tis called a Monument, becauſe *Monet nos quod ſumus Mortales.*

Now, tho' the Freehold of the Church or Churchyard where a Monument is Erected may be in the Parſon, yet thoſe who Build it, or the Executors, may have an Action on the Caſe againſt him who defaces it.

The firſt that we meet with in our Books was, *Anno* 9 *Ed.* 4.* it was brought by the Lady *Wych*, againſt a Parſon, for taking down a Coat Armour of her Husband Sir *Hugh Wych*, in the Chappel where he was Buried; the Parſon Pleaded that he ought to take it down as due to him, being an Oblation. *Yelverton* who was then one of the Judges of *B. R.* told him, that he might as well take away his Bible, Carpet and Cuſhion, which he left in his Seat, and that nothing could be an Oblation but what was intended as ſuch by the Giver; but that a Coat Armour was ſet up by the Living, in Honour and Memory of the Dead.

Agreeable with this year Book was the Caſe between *Coryon* and *Pym*, which my Lord *Coke* cites to be adjudged in the Common Pleas, *Anno* 10 *Jac.*

(*a*) Dyer 277. (*b*) 2 Cro. 57. Moor. 913. 2 Rep. 47. 4. (*c*) 3 Inſt. 202.
9 Edw. 4. 14 *a.*

The caſe is Reported by Serjeant *Moor*, (*d*) but 'tis not to this purpoſe, for it was that a Man cannot preſcribe to a Seat in the Body of the Church, becauſe the Parſon and Church-wardens have power to diſpoſe them to whom they think fit; but that he might preſcribe to a Seat in an Iſle, for that may be preſumed to be built either by his Anceſtor or the Owner of the Land, *&c.*

'Tis true, my Lord *Coke* there cites the Lady *Grey*'s Caſe, who ſet up her Husbands Arms and Helmet in the Church, and the Parſon took them down, for which they brought an Action on the Caſe againſt him, and adjudged that it would lye.

Mortmain.

THIS is where Lands are given to ſome Spiritual Perſon or Corporation, and to their Succeſſors. It was occaſioned at firſt by the Monks perſwading the Ignorant People into the belief of Purgatory, where the Souls of the Deceaſed might be relieved by Maſſes from thoſe Torments which otherwiſe they would ſuffer, and by the ſame means would afterwards be relieved from them, and this made them give Lands to thoſe Houſes to find a Prieſt to ſay Maſſes every day for their Souls.

And becauſe ſuch Lands were never to revert to the Donor or his Heirs, and by that means the Services and other Profits due for the ſame were Extinct, therefore it was called a Gift in *mortua manu*.

So great was the Superſtition of former Ages, that theſe Monaſteries would have got moſt of the Lands in *England*, if ſome Statutes had not been made to reſtrain ſuch Gifts; the purport of which were, *viz.* that grants of Lands to Religious Houſes ſhould be void, if made *without the King's Licenſe*, that is, if they were held immediately of him; but if ſuch Lands were held of an inferior Lord, then the Licenſe muſt be had both from the King and him.

If there was no ſuch Licenſe, then whoever had the Inheritance might enter within a Year after the Alienation, and if he neglected, then the next immediate Heir might enter in Half a Year, and if he did not, then the King might.

But theſe Statutes did not altogether prevent the Inconveniencies intended; for the Kings ſeldom refuſed to confirm ſuch Grants, for if they did, their Reigns would have been very uneaſie.

(*d*) Moor 878. 2 Rol. Abr. 288.

Since

Since the Reformation, there have been ſome Caſes, but not many, concerning theſe Gifts in Mortmain: (e) I ſhall Inſtance but one, *viz.* a Man Deviſed his Lands to *Trinity College* in *Cambridge*, for the maintenance of a Scholar there; and he farther Devited, that if any Cavil ſhould hinder this Deviſe, or that the ſame ſhould not go to the College, by reaſon of the Statute of Mortmain, then he Deviſed it to *Robert Newman* and his Heirs.

Upon an Information brought by the Attorney General againſt *Newman*, the Lands were decreed to the College, by virtue of the Statute 43 *Eliz.* as being a Charitable Gift. (f) 'Tis true, the Deviſe is void upon the Statute of Wills, becauſe 'tis to a Corporation in Mortmain; but 'tis good upon the Statute of Charitable Uſes.

Mortuary.

THERE was a Duty paid at Funerals, by our *Saxon* Anceſtors, which was called *Symbolum animæ*, or the *Saxon Soul Shot*, and this payment was not only enjoyned by Councils, but by the Laws of *Canutus*, one of our *Daniſh* Kings.

It was due to that Church of which the Party deceaſed was a Member, and not to the Church where he was Buried; the payment was always made in Money, and ſome are of Opinion that this was the Original of Mortuaries, only with this difference, by turning the payment of Money into Goods; for in the Reign of *Hen.* 2. it became a ſettled and cuſtomary Duty for a Freeholder to give his beſt Goods as an Heriot to the Lord of whom he held his Lands, and that which was next to the beſt was to be given to the Church where the Party had received the Sacrament:

It was acknowledged by Archbiſhop *Winchelſea*, in the Reign of *Edw.* 1. to be an ancient Right due to the Church; and by a Provincial Conſtitution made in his time, it was ſuppoſed to be due for Tythes and Oblations which had been neglected to be paid by the Deceaſed, and therefore to ſettle a reaſonable Compenſation in ſuch Caſe, it was Decreed, that where there was a choice of Three things, the Second beſt ſhould be paid for a Mortuary:

The like was Decreed by ſeveral Councils afterwards, and particularly in a Provincial Council, in the time of Archbiſhop *Langham*, *Anno* 1 *R.* 2. where amongſt other things it was Decreed, that if a Feme Covert died in the life time of her Husband, ſhe ſhould not pay a Mortuary.

(e) 2 Lev. 284. (f) Hob. 136.

And it was not only cuſtomary to pay this Duty, but it was uſual to bring it to the Church when the Corps was Buried, and then to offer it as a ſatisfaction for the ſuppoſed negligence in ſubſtracting Perſonal Tythes; (g) and from hence, as Mr. *Selden* tells us, it was called a *Croſe Preſent.*

But cuſtom obtained againſt theſe very Decrees, for by the Statute *circumſpecte agatis*, which was made at the ſame time, the payment of a Mortuary was left to cuſtom, *viz.* that it ſhould be paid *ubi dari conſuevit.* And from hence my Lord *Coke* (*h*) infers, (and very rightly) that a Mortuary is not due by Law, but by Cuſtom.

And this appears very plain by the Statute 21 *Hen.* 8. *cap.* 6. which is now the ſtanding Law concerning Mortuaries, *viz.* The Preamble recites, *That Doubts and Queſtions had been made not only upon the manner and form of demanding, but of the Quantity and Value of Mortuaries; and therefore it was enacted, That no Perſon ſhould demand a Mortuary, where by Cuſtom it hath not uſually been Paid, nor by the Death of a Feme Covert*, and in this reſpect that Law was conformable to the aforeſaid Conſtitution.

It was further Enacted, *That it ſhould not be demanded on the Death of a Child, or of a Perſon who was not an Houſe-keeper, or of a Traveller, or of one not reſiding in the place where he Died, nor where the Goods of the Deceaſed were not of the Value of* 10 *Marks, his Debts being deducted; and that no Perſon ſhould take above* 3 s. 4 d. *where the Goods did not exceed* 30 *l. nor above* 6 s. 8 d. *where they exceed* 30 *l. and not* 40 *l. nor above* 10 s. *where they amount to* 48 *l. or more, under the Penalty of forfeiting ſo much as he takes or Demands more, and likewiſe* 40 s. *to the Party grieved, to be recovered by Action of Debt; and that if the Perſon ſhould happen to die in the place where he did not dwell, the Mortuary muſt be paid where he did moſt commonly Live, and that ſuch Mortuaries which had then been ſettled by Cuſtom, if leſs then abovementioned, ſhould not be altered.*

Before this, it was the common Opinion, That a Mortuary could not be recovered but in the Spiritual Court; and that if a Prohibition was brought, conſultations in ſuch Caſes had always been Granted; ſo is *Fitzherbert* (*i*) in his *natura Brevium, viz.* where Cuſtom is alledged for the payment of a Mortuary, it ſhall be tried in the Spiritual Court, and the reaſon is, becauſe that Court had the Original Cognizance of Mortuaries, and therefore it was held reaſonable that all dependencies on it ſhould be tried there.

I cannot deny but that there are ſome Caſes in the Old Books which tend this way, as *Anno* 10 *H.* 4. *Plito* 2. (*k*) A

(g) Hiſt. Tythes, 287. (*h*) 2 Inſt. 491. (*i*) F. N. B. 51, 53. (*k*) Fitz J. 38.

Præmunire

Præmunire facias was brought againſt the Vicar of *S.* for ſuing in the Spiritual Court for an Heifer, *&c.* pleaded a Cuſtom in the Pariſh, to have the beſt Beaſt for a Mortuary of every Pariſhioner dying there, and that ſuch a Perſon died poſſeſſed of the Heifer which the Vicar would have ſeiſed, but the Plaintiff privately drove it away, and thereupon the Vicar ſued him in the Spiritual Court to produce it, now tho' it was objected that this was only a Chattel, and the Queſtion was only about the Poſſeſſion, and for that reaſon it ought to be tried at Law, yet the Plea was held good, becauſe the temporal Courts had no Juriſdiction of Mortuaries nor of any of its Dependencies.

So *Anno* 2 *H.* 5, 10. in Treſpaſs for taking an Horſe, the Defendant pleaded to the Juriſdiction of the Court, for that he was Vicar of *G.* and the Plaintiff was Parſon of the ſame Church, and that *R.* a Pariſhioner died poſſeſſed of the Horſe which the Vicar took as a *Mortuary*, now this had been a good Plea if the property of the Horſe had been admitted to be in the Pariſhioner at the time of his Death, but that was denied, for he had only the Poſſeſſion and the Plaintiff claimed the Property.

More Caſes might be cited to this purpoſe, but ſince the Statute, the Law hath been adjudged to be otherwiſe, for if the Cuſtom is denied, it ſhall be tried at Common Law, (*a*) and a Prohibition ſhall be granted unleſs the Suit is for ſo much Money due for Mortuary, and the Plaintiff ſuggeſts that the *quantum* is ſettled by the Statute, but doth not alledge 'tis of a leſs vallue, for in ſuch caſe no Prohibition ſhall go, becauſe the Statute doth not take away the Juriſdiction of the Spiritual Court.

So if 'tis admitted that a Mortuary (*b*) is due by Cuſtom, but the Parties differ to whom it ought to be paid, whether to the Impropriator or the Vicar, a Prohibition ſhall not be granted becauſe the Cuſtom is admitted.

But where the Cuſtom is denied it ſhall be tried at Law, (*c*) becauſe Cuſtoms are part of the Law of the Land, therefore where 'tis alledged *de modo decimandi* (*d*) it ſhall be tried at Common Law.

When the ſecond beſt thing was to be paid for a Mortuary, it was lawful for the Party to ſeize it where he could find it, but ſince Mortuaries are now reduced to a certain Sum of Money where due by Cuſton, it ſeems reaſonable that an

(*a*) Cro. Eliz. 151. Cro. Car. 238. 3 Mod. 268. (*b*) Sid. 263. (*c*) 2 Lut. 1069. (*d*) 2 Roll. Abr. 307. 13 Rep. 18, 37.

Action of Debt ſhould lie for the recovery of ſuch a Duty, but 'tis plain, that ſuch an Action will lie for the forfeiture of 40 *s.* to the Party grieved, and for ſo much more as was taken from him beyond the vallue mentioned in the Statute, and of ſuch an Action we have a preſident in my Lord *Coke*'s Entries. (*e*)

Ne admittas.

THIS is a Judicial Writ directed to the Ordinary, and may be brought either by the Plaintiff or Defendant in a *Quare impedit*, and 'tis to command him not to admit the Clerk of the other Party *pendente lite*.

If the Biſhop ſhould admit the Clerk, notwithſtanding this Writ and the Party ſhould recover in the *Quare impedit*, he may then bring a *Quare incumbravit* * againſt him, and remove the Clerk which came in pending the Action by any Title whatſoever, and if 'tis found by Verdict, that the Biſhop did incumber the Church after the *Ne admittas* delivered, and within ſix Months after the Avoidance the Jury may award Damages, but his Temporalties are not to be ſeiſed for this contempt as they may upon an Attachment or a Prohibition.

The Clerk thus removed, tho' he hath a right, ſhall never recover it but by a *Quare impedit*, but if no Writ of *Ne admittas* is brought, then if the Clerk of a Stranger ſhould come in *pendente lite* by a good Title he ſhall hold it.

This Writ muſt be brought in the County where the Church is, and within ſix Months after the Avoidance, for otherwiſe the Biſhop will have a Title to preſent by Lapſe, but 'tis very rarely brought, becauſe ſince the Reformation the Biſhops ſhew no manner of partiality in Admiſſions, which was uſual before.

New Stile.

UNDER this Title I ſhall give a ſhort account of the Chriſtian *Epocha*.

Ægypt being conquered by *Julius Cæſar*, and the People there being very expert in Aſtronomy, he brought from thence a more perfect account of the Solary Year then what was uſed or known amongſt the *Romans*.

(*e*) Co. Entr. 164. * 2 Cro. 93.

It was firſt drawn up by *Soſigenes* and publiſhed by *Julius Ceſar* forty five Years before the Birth of our Saviour, and from him 'tis called the *Julian Year*; it was ordered by him to be obſerved throughout the Empire, of which *England* was then a Province, and this account is ſtill retained here, and called by the name of Old Stile, which is thus:

The Year was ſuppoſed to conſiſt of 365 days and *ſix hours*, which hours are an Appendix to the Year, but could not conveniently be added to it, therefore they were ordered to be reſerved to the end of four Years, and being then added together they made a whole day, which day was to be inſerted at the end of *February*, becauſe that was not only the ſhorteſt but the laſt Month of the Year, and this made 29 days in that Month, and 'tis called an intercalary day.

For the better underſtanding this matter, it is neceſſary to ſhew that *Romulus* divided the Year into ten Months, but *Numa Pompilius* added two more, which were *January* and *February*, and to the laſt he gave only 28 days.

Now becauſe the 23d day of *February* was ſix days before the Calends (that is, the firſt day) of *March*, reckoning that day incluſively; for every firſt day of the Month was the firſt of the Calends of that Month, therefore every fourth Year they reckoned the ſixth day of the Calends of *March*, twice over, or two days together, that is, on the 22d and 23d days of *February*, one of which days is excluſive and the other incluſive of the ſixth day of the Calends of *March*, and for that reaſon the encreaſing day is called *Dies bis Sextus*, and and the Year *Annus Biſſextilis* or Leap Year, becauſe it was a day longer then other Years.

We being once ſubject to the *Romans* received the *Julian account* from them, and purſuant to their method, we keep the Year within the compaſs of 365 *days*, and the Parliament *Anno* 21 *H.* 3. Enacted that the encreaſing day in the Leap Year, and the day going before ſhould be accounted for one day, and this is called Old Stile.

But becauſe there wanted eleven Minutes in the ſix odd Hours according to the *Julian* account, and the *Æquinoxes* and *Solſtices* looſing ſomething every Year were found *Anno* 1582, to have gone back ten whole days; therefore Pope *Gregory* the 13th, by his own Power and Authority ſet aſide this old account, and by the help of *Antonius Lilius* reformed the Calendar, cutting off ten days in the Month of *October* in that Year, ſo that he skipped from the fourth to the fifteenth day of that Month, and becauſe the Saints to whom thoſe rejected days were aſcribed ſhould have their due obſervance

(amongſt which St. *Luke* was one) that Pope appointed that all of them ſhould be commemorated on the fifteeth day of *October* in that Year, and this is called the *Grogorian* account or New Stile, and is obſerved in moſt parts of Europe.

Nomination.

THIS is the offering of a Clerk to him who hath the right of Preſentation, that he may preſent him to the Ordinary.

This right of Nomination a Man may have by Deed, and in ſuch caſe if the Patron ſhould refuſe to preſent to the Nominee, or ſhould preſent another, he may bring a *Quare impedit* againſt him, (*b*) and it ſhall be *quod permittat eum preſentare* and not *nominare*, &c. but the concluſion of the Declaration ſhall be *& ea ratione ad ipſum pertinet nominare*, ſuch a Perſon who ought to preſent him to the Ordinary, and that the Defendant doth hinder him to nominate, and if he recovers, the Judgment muſt be *quod Epiſcopus admittat Clericum ad nominationem ſuam*.

The Nominator muſt appoint his Clerk within ſix Months after the Avoidance, for if he doth not, and the Patron preſents his Clerk before the Biſhop hath taken any benefit of the Lapſe, he is bound to admit that Clerk.

But where one hath the Nomination and another the Preſentation, if the right of Preſentation ſhould afterwards come to the Queen, it hath been held, that he that hath the Nomination will be entituled to both, becauſe the Queen, who is to preſent, is only an Inſtrument to him who Nominates, and 'tis not becoming the Dignity of a Queen to be ſubſervient to another, but I think rather with Juſtice *Doderidge*, that the Nominator ſhould name one to the Lord *Chancellor*, who in the name of the Queen ſhould preſent to the Ordinary.

And as the Preſentation, ſo the right of Nomination may be forfeited to the Queen, 'tis true, if the Patron upon a corrupt Agreement unknown to the Nominator, preſents his Clerk, this ſhall not be prejudicial to the Nominator within the Statute of *Symony*, but if the Nominator Corruptly agreeth to nominate, his right of Nomination ſhall be forfeited to the Queen.

Juſtice *Doderidge* found out a very nice diſtinction relating to a Nomination of Clerk which was thus:

(*b*) Moor 470.

Tenant

Tenant in Tail of an Advowſon by Fine, Grants *the Nomination* of a Clerk, this he tells us ſhall bind the iſſue in Tail by vertue of the Statute 32 *H.* 8. *cap.* 36. but if he had granted the Nomination by Fine to a Man and his Heirs, and that when the Church was void the Grantee and his Heirs might Nominate, and that he, (*viz.*) the Tenant in Tail and his Heirs would *preſent the Nominee*, this Fine would not bind the Iſſue in Tail, becauſe he had diſtinguiſhed the Nomination from the Preſentation, and ſo the Fine was not levied of the thing entailed, but only of the Nomination.

Notice.

THERE are many Caſes in the Law relating to Eccleſiaſtical Affairs, which depend purely upon Notice, and therefore it may not be improper to inform the Reader in what Caſes Notice is neceſſary and where not.

And this chiefly relates to Avoidances by Act of Parliament, Ceſſion, Death, Deprivation, Plurality, Reſignation.

And laſtly in the caſe of a refuſal of a Clerk by the Ordinary, and of notice about ſetting out Tithes.

As to *Avoidances by Act of Parliament*, Notice ought not to be given to the Patron, becauſe all Perſons are virtually parties to a Statute Law.

But there are ſome Acts by which 'tis expreſly required that notice ſhould be given, as by the Statute 13 *Eliz. cap.* 12. 'tis provided, that no Title to preſent by Lapſe ſhall accrew upon any Deprivation *ipſo facto* till after ſix Months notice of ſuch Deprivation given by the Patron to the Ordinary.

By the aforeſaid Statute (*c*) if a Layman, or one not being a Deacon, and of the age of twenty three Years, is admitted to a Benefice with Cure his *Admiſſion is void*, and the Patron may preſent again without Notice.

But becauſe the Statute makes only the *Admiſſion void* and leaves the *Preſentation* as it was before, therefore in the caſe of a Deacon the *Preſentation* being in force, no Lapſe ſhall incur if he is deprived for incapacity without notice given.

The like is required by the Statute 13, 14 *Car.* 2. *cap.* 4. *viz.* that no Title of Lapſe ſhall incur if a Man is *deprived* for not declaring his aſſent and conſent to the Book of Common Prayer, and ſubſcribing the Declaration, *&c.* without notice given of the Sentence of Deprivation.

(*c*) March 119.

Ceſſion,

Ceſſion.] Where an Avoidance is by *Ceſſion* the Patron is bound to take Notice thereof at his Peril.

Death.] He is alſo bound to take the like Notice upon an Avoidance by Death, and in ſuch caſe the ſix Months are to be accounted from that time in which he (*d*) might reaſonably have Notice, and not immediately after the death of the Incumbent.

Deprivation.] In Caſes of *Deprivation* Notice muſt be given to the Patron by the Ordinary before the Title by Lapſe ſhall accrew, and this muſt be perſonal Notice if the Patron lives in the ſame County, but if in another County, then Notice muſt be publiſhed in the Pariſh Church and fixed on the Church Door, but this is *ultimum refugium* as my Lord *Dyer* (*e*) calls it, for if it can be done in Perſon 'tis better, and 'tis to be obſerved, that ſuch notice muſt expreſs (*f*) the cauſe of Deprivation.

But in this caſe Notice or not, ſeems chiefly to effect the Ordinary, for he ſhall have no benefit of a Lapſe, till Notice given to the Patron, and his refuſal for ſix Months; but the Church being actually void upon a Deprivation, the true Patron is at his Peril to take notice of it in reſpect to a *Stranger*, tho' he is not bound to do it in reſpect to the Ordinary, for if a Stranger (*g*) ſhould preſent, and his Clerk is admitted and inſtituted, and the ſix Months paſs, he hath got a right by Uſurpation.

Plurality.] Where the Avoidance is by taking a ſecond Benefice, 'tis neceſſary to know wherein the Canon-Law differs from the Statute-Law as to this matter, *viz.* By the Canons of the Church, if a Clerk hath a Benefice under 8 *l. per Ann.* and he is inſtituted into another of what vallue ſoever, whether little or great the firſt is void *de jure*, but not *de facto* till ſentence of Deprivation, (*h*) and becauſe the Avoidance was by the Canon-Law, therefore no Lapſe can incur to the Ordinary till Notice given to the Patron.

But he may preſent within the ſix Months (*i*) and before any Sentence of Deprivation, or he may refuſe till the Clerk is actually deprived and Notice given, *&c.*

By the Statute, if a Clerk hath a Benefice of 8 *l. per Ann.* or above, and takes another of any vallue, the firſt is *ipſo facto* void, and the Patron is not to expect any notice from the Ordinary, becauſe the Avoidance, in caſes of Plurality,

(*d*) 2 Roll. Abr. 363. (*e*) Dyer 328. (*f*) Yel. 7. 6 Rep. 29. (*g*) 2 Roll. Abr. 369. Hob. 318. (*h*) 2 Roll. Abr. 364, 365. (*i*) Moor 542. Cro. Eliz. 601. 4 Rep. 75. Vaugh. 131.

is

is now eſtabliſhed by (*k*) Act of Parliament, and of ſuch Avoidances the Patron muſt take notice at his Peril.

Reſignation.] In caſes of *Reſignation* Notice muſt be given to the Patron, and that by the Ordinary to whom the Benefice was reſigned, and if he ſhould die before he gives Notice, the Guardians of the Spiritualties muſt do it, and if they neglect, then it muſt be done by the ſucceeding Biſhop before any Title of Lapſe ſhall accrew to him.

Now in this caſe as well as in caſes of Deprivation, the Patron may take notice if he will, but if he ſuffer a Stranger to preſent, and his Clerk gets admiſſion, *&c.* and the ſix Months paſs this Preſentation and Incumbency make an Uſurpation, becauſe the Induction is a publick and notorious Act, (*l*) and therefore the true Patron ought to take Notice of it at his peril, that he may provide a proper Remedy within time, and not looſe his Preſentation, unleſs the Reſignation was by fraud and contrivance to defeat the true Patron, for then notice muſt be given of the Reſignation.

Refuſal of the Clerk.

If the Biſhop refuſed to admit the Clerk preſented to him, in ſuch caſe he muſt give notice to the Patron, and ſhew for what reaſon he refuſe, (*m*) and this muſt be in ſome reaſonable time, a Month is too long.

But they diſtinguiſh between a Clerk of a Spiritual Perſon and of a Layman, (*n*) for in the firſt caſe he is not bound to give notice, becauſe a Spiritual Perſon ſhould have preſented one qualified in all reſpects fit for the Cure; but he is bound to give notice to a Lay-Patron where he refuſes his Clerk.

Setting out Tithes.

'Tis a common Opinion that the Pariſhioners are bound to give the Parſon Notice of ſetting out their Tithes; 'tis true, the Canon Law obliged them ſo to do, but 'tis otherwiſe by the Common Law which prevails in this caſe, for if the Pariſhioner ſets out his Tithes (*o*) truly, he is not bound to give Notice either to the Parſon himſelf or any other general Notice at the Church of the time when he ſhall ſet them out.

He cannot obſtruct either the Parſon or his Servants to be there, (*p*) who are bound to carry the Tithes away in convenient time after they are ſet out, if they neglect, in ſuch

(*k*) Jones 377, 404. Dyer 237. (*l*) 2 Roll. Abr. 369. (*m*) Cro. Eliz. 119. 1 Leon. 31. (*n*) 3 Leon. 46. Latch. 192, 253. (*o*) 1 Roll. Abr. 643. Stiles 342. (*p*) 3 Bulſt. 336. Godb. 229. Noy. 19. 2 Vent. 48.

caſe

caſe the Pariſhioner ought to give Notice that the Tithes are ſet out, otherwiſe he cannot have an Action for not carrying them away.

Obits, Oblations, Obventions.

AN *Obit* was an Office performed at Funerals when the Corps was in the Church and before it was buried, it afterwards came to be anniverſary, and then Money or Lands were given towards the maintenance of the Prieſt who ſhould perform this Office every Year.

Oblations and *Obventions* are two words, ſignifying the ſame thing, and are uſually accounted to be whatever is given or offered by Religious Chriſtians to God and the Church, whether in Lands or Goods, and 'tis not material whether ſuch things are given by Will or otherwiſe.

'Tis probable that the Example of St. *Paul*, might incite the primitive Chriſtians to offer theſe Gifts to the Church, for he appointed every one of his *Corinthians* and *Galatians* to yield ſomething to God for the Saints every Lord's Day; but this being thought too often, therefore *Tertullian* tells us it was afterwards done every Month, and then *ad libitum*, but it was always the Cuſtom for Communicants to offer ſomething at receiving the Sacrament, as well for Holy Uſes as for relief of the Poor, which Cuſtom is or ought to be obſerved at this Day.

In the firſt Ages of the Church thoſe *depoſita pietatis* (q) which are mentioned by *Tertullian* in his Apologetick, were all voluntary *Oblations*, and they were received in lieu of Tithes, for the Chriſtians at that time lived chiefly in Cities, and gave out of their common Stock both to maintain the Church and thoſe who ſerved at the Altar.

But when their numbers encreaſed, and they were ſpread abroad in the Countries, then a more fixed Maintenance was neceſſary for the Clergy, but ſtill Oblations were made by the People, which if in the Mother-Church then the Biſhop had half, and the other was divided amongſt the Clergy, but if offered in a Pariſh-Church then the Biſhop had a third part and no more.

Theſe *Oblations* which at firſt were voluntary, did afterwards by a continual payment become due by Cuſtom.

(q) Still. 169, Tect. Apolo cap. 39.

'Tis

'Tis true, there are Canons which require every one who approaches the Altar to to make ſome Oblation to it as a thing *convenient* to be done.

But at the great Feſtivals all People were obliged to offer ſomething, not only as *convenient* but as a *Duty*, but the proportion was left to the Diſcretion of the Giver, and I think with great reaſon, for the bounty of the Chriſtians in thoſe Ages was ſo great, that Men would build Churches on their own Lands on purpoſe that they might have an equal ſhare of thoſe Oblations with the Clergy.

And this might be the occaſion that the Emperors *Cnſtantine* and *Valentinian* made Laws to Prohibit ſuch exceſſive Gifts, which in thoſe days were kept in Store-houſes built for that very purpoſe.

But in ſucceeding Ages there was little occaſion for ſuch Laws, for the Zeal of the People were ſo conſiderably abated, that inſtead of thoſe Repoſitories the Clergy had little Cheſts to contein thoſe Gifts, till at laſt they dwindled into ſo ſmall a Portion that now they can ſcarce be felt in the Parſon's Pocket.

Beſides, thoſe Oblations made by the living, it was then alſo uſual to offer ſomething at the death of Perſons, which our *Saxon* Anceſtors called the *Symbolum animæ*, and we, from them, call it the *Saxon* Soul Shot, and this was at firſt diſtinct from a Mortuary, tho' probably it might afterwards give a riſe to that Duty.

There were many other occaſional Oblations in thoſe days, upon particular Services, but at certain times, as at Marriages, at Churching Women, and theſe were due by Cuſtom; the Oblation of Fowls at *Chriſtmas*, and the firſt Fruits of Corn payable on St. *Martins* Day.

The Offerings likewiſe at *Eaſter* are due by Cuſtom, for they are not voluntary Oblations, but are paid as a Compoſition for Perſonal Tythes due at that time, and not for Sacraments, as ſome have imagined, for if ſuch Offerings are not Perſonal Tythes, then none are paid in *England*; for who pays any thing out of the profits which ariſe by manual Occupations or for Merchandize, beſides theſe Cuſtomary Offerings at *Eaſter*?

Theſe are confirmed by the Statute (*a*) to ſuch Perſons, and to be paid in ſuch places where the ſame hath been uſed to be paid for 40 years before that Act was made, but Day-Labourers are excepted.

(*a*) 2 Edw. 6. cap. 13.

That

That Statute likewiſe enjoyns that the payment ſhall be made in the place where the Party dwells, at ſuch four Offering days as heretofore, that is, at *Chriſtmas*, *Eaſter*, *Whitſontide*, and on the Feaſt-day of that Saint to whom the Pariſh Church was Dedicated, and if no ſuch Dedication, then it was to be paid at *Eaſter*.

Thus the Profits of the Churches in *London*, and in other great Cities, were originally Oblations and Obventions, which for many Ages have been called Tythes; they could not be Prædial unleſs the Houſes grew out of the Ground, and they could not be mixt Tythes: For tho' ſomething might ariſe by the induſtry of Men, yet it was not out of the Earth, ſo that it muſt be a Perſonal Tythe or nothing, and therefore thoſe cuſtomary Offerings at Marriages, Churching of Women, *&c.* which were paid before the Statute, ought to be paid now, and are recoverable in the Spiritual Court.

Ordination.

THE Apoſtles appointed Biſhops, Prieſts and Deacons to be the ſtanding Guides and Governors of the Church, and becauſe there ſhould be a Succeſſion of them continued in all Ages, for the peace and preſervation of thoſe Churches which they had Planted, therefore 'tis neceſſary that there ſhould be a Power lodged ſome where, to ſet a-part ſome diſtinct Orders of Men to thoſe publick Offices, and this is called Ordination.

All hold it neceſſary that there ſhould be ſuch a Power, but they diſpute where it is.

Thoſe who diſſent from Epiſcopacy affirm, that a Man ought not to take upon him the Miniſtry without a lawful Call, which is very true. They likewiſe agree, that Ordination ought to be continued, and they define it to be a ſolemn ſetting a-part ſome Perſon to a Church Office, but they ſay 'tis not only to be done by impoſition of Hands and Prayer, but with Faſting by *Preaching Presbyters*, and that thoſe who are not ſet a-part themſelves for the work of the Miniſtry, have no Power to joyn in ſetting a-part others for that purpoſe; and this form of Ordination was propoſed to the Parliament, in the year 1643. by an aſſembly of thoſe Perſons, in order to be Ratified.

There are another ſort of People who diſſent from Epiſcopacy, and they hold, that where there are no ſuch *Preaching Presbyters*, in ſuch Caſe other Perſons ſufficiently qualified and approved for their Gifts and Graces by other Miniſters, being

being choſen by the People, and ſet a-part for the Miniſtry, by Prayer and Faſting in the Congregation, may exerciſe that Office; ſo that ſome place the Power of Ordination in ſimple Presbyters, and others in the People.

There are ſome who have advanced very ſtrange notions of Ordination, telling the World that 'tis not to be Juſtified by the Scripture, that the word it ſelf ſignifies a lifting up of Hands, and is uſed in Scripture for giving a Vote, which in all popular Aſſemblies is Cuſtomary even at this day; from whence they infer, that the Chriſtian Churches were at firſt Democratical, that is, the whole Congregation choſe their Paſtor, and that by virtue of ſuch choice he did not pretend to any peculiar Juriſdiction diſtinct from others, but he was only approved by the Congregation for his Parts, and appointed to inſtruct the People to viſit the Sick, and to perform all other Offices of a Miniſter; and at other times he followed his Trade, and that the Chriſtians in thoſe days had no notion how a Paſtor could pretend to any Succeſſion to qualifie him for the Miniſtry, for that the pretence of diſpenſing Divine things by a meer humane conſtitution, was ſuch an abſurdity, that it could not be reconciled to Reaſon.

This and many more ſuch calumnies were caſt on Ordination, and the Biſhops themſelves were called Ordination Mongers, but it was by thoſe who alledged that the purity of the Chriſtian Religion, and the good and orderly Government of the World had been much better provided for without any Clergy.

But I ſhall ſhew from Scripture, from Antiquity, and from the concurrent Teſtimony of the Fathers, that Biſhops had, and ought to have the Power of Ordination.

When our Saviour eſtabliſhed the Chriſtian Church, he made his Apoſtles Governors thereof, and veſted them with a Power to ordain others to the Miniſtry, and accordingly they ordained the Seven Deacons, and conſecrated St. *James* Biſhop of *Jeruſalem*, and he ordained Presbyters of that Church.

That *Timothy*, as ſoon as he was made a Biſhop of *Epheſus*, by the great Apoſtle of the Gentiles, but not before, had this power of Ordination, this is allowed by St. *Chryſoſtom* himſelf, who magnified the power of Presbyters more than any of the Fathers, and he proves it thus, *viz.* becauſe St. *Paul* gave *Timothy* a caution not to admit any one raſhly to an Eccleſiaſtical Office.

'Tis true, he likewiſe bid him not to deſpiſe the Gift which was given to him by Prophecy, with laying on Hands of the Company of Elderſhip; but he could not mean by thoſe words

words an assembly of Ordinary Presbyters, for as such they could not have conferred any extraordinary Commission, especially upon *Timothy*, because he was at that very time a Bishop, and ordained by St. *Paul* himself.

He had a Jurisdiction over all the Presbyters of *Asia*, for he had power given him by that Apostle to enquire into their Conversation and Abilities, and then to admit them into that Holy Office if he found them qualified, and not otherwise.

Titus had the same power throughout that populous Island of *Crete*, and these things are so plain, that they must deny the Authority of the Scriptures, who deny the power of Ordination to be originally in Bishops, and therefore they have invented a senseless Objection, *viz.* that tho' *Timothy* and *Titus* were superior to Presbyters, yet their power was but Temporary, for they were chosen by the Apostles at that time upon a particular occasion to preside in the Assemblies of Presbyters to moderate the Affairs of those Churches, which power was to determine at the expiration of their Commission.

But this cannot be proved by History or any Records, 'tis a meer imaginry Whimsie, contrived to make a Parity between those two distinct Orders of Men, and it can have no foundation in Scripture, from the promiscuous use of the words Bishop and Presbyter, for tho' tis true that the last is used to shew the humility of a Bishop, yet 'tis as true that the word Apostle is likewise used to shew his Superiority.

So that in the primitive times Bishops ordained as Bishops and not as Presbyters, and the very act of Ordination was not then a power of Order, but it was an act of Jurisdiction. This distinction hath since been found out by the Schoolmen, for in those days, as it hath been already observed, Bishops and Presbyters were accounted distinct in Order, whatever hath in late years been advanced to the contrary.

Therefore the Objection that a Bishop and Presbyter were neither distinct in Order or Office, that tho' the Apostles and those who immediately succeeded them, exercised a larger Jurisdiction, yet it was granted to them by our Saviour, as they were Apostles, and did in no wise concern their Successors, to whom he gave no such Authority, nor any manner of superiority over their fellow Presbyters. These, and such like, are Doctrines which neither agree with the Scripture, nor with the Fathers, they are contrary to the plain and constant usage in the Church for sixteen Hundred Years, during all which time most Christian Churches have been governed by Bishops; and tho' some of the reformed had not that form of Government amongst

mongſt them, yet *Calvin* and *Beza*, who were the moſt learned amongſt them, have approved and commended it, and not only ſo, but lamented that they were not permitted to retain it.

But to ſhew that a Biſhop and Presbyter were not accounted by the Fathers to be the ſame thing, I ſhall inſtance the Opinions of *Clemens Romanus*, and *Hermes*, who lived and wrote in the firſt Century, and both of them affirmed they were diſtinct in Order, and ſo did St. *Ignatius*, and others in the ſecond Century, ſo that we have at leaſt as equal Authority to believe that this power of Ordination was originally in Biſhops, as we have to believe ſuch parts of the Scripture to be Canonical, becauſe thoſe Books which were Apocryphal were not divided from the other till the ſecond Century, and therefore thoſe which are admitted to be Canonical by the Church, muſt depend upon the credit of thoſe Fathers who lived in that very Century.

If we look into the Eccleſiaſtical Hiſtories, we ſhall find that this power was in the Biſhops, in the firſt four Centuries, 'tis evident from the Apoſtolical Canons in the third Century, and by ſeveral other Canons made in General Councils; and tho' the Presbyters of the *Weſtern Church* were allowed to lay on their Hands at Ordinations, at the ſame time with the Biſhop, yet that was not of neceſſity, but only for the greater ſolemnity of the Act, and this is allowed by *Salmatius* himſelf, (*a*) who cannot be thought partial in favour of Epiſcopacy.

But there are ſome who will have it that St. *Jerome* in his Epiſtle to *Evagrius* affirms, (*b*) that the Presbyters of *Alexandria* ordained their own Biſhop from the time of St. *Mark* to the time of *Heracles*, and *Dioniſius* who were Biſhops and Presbyters there, and this is produced as a common Allegation againſt the Right of Biſhops to ordain, *&c.*

But it will appear otherwiſe upon Reading the Words, for he tells us, that they Choſe one out of their number, and placed him in higher degree than the reſt whom they called a Biſhop, juſt as an Army chooſes a General, *&c.* ſo that he ſpeaks of the Election, and not of the Ordination; for the placing a Perſon on the Biſhops Throne was in thoſe days a ſign that he was the Man Elected, but the Ordination was performed by other Biſhops.

'Tis true, ſome Presbyters did undertake to ordain without the Biſhops, but thoſe Ordinations were always condemned as invalid, and to be meer uſurpations upon the power of

(*a*) Salm. 289. (*b*) Epiſt. 85.

Biſhops, and even *Novatius* himſelf, who was a Presbyter at *Rome*, and a great diſturber of that Church, would not venture on ſuch an Ordination when he oppoſed *Cornelius*, and attempted to be made Biſhop of *Rome*, but ſent for three Biſhops out of remote parts of *Italy* to ordain him.

After all, we are told by a late wrong aſſerter of the Rights of the Church,(c) that Archbiſhop *Granmer* at a Conſult of the moſt Eminent Divines of his time gave it under his Hand, that the Ceremonies and Solemnities uſed in admitting Biſhops and Prieſts to their reſpective Offices were not of neceſſity, but only to preſerve Order, and that God never promiſed more Grace in committing the Eccleſiaſtical, than the Civil Offices; for the Scripture doth not require that a Biſhop ſhould be Conſecrated, ſince the very Election or Appointment is ſufficient.

But with his leave, 'tis very doubtful whether that Archbiſhop was ever of that opinion, but if he was he came to be better adviſed, for he changed it, and this appears from his Sermon concerning the Authority of Kings, which is in his Book entituled *Catechiſmus*, and there he obſerved that St. *Paul* poſitively declared it to be neceſſary to Salvation to have Preachers and Miniſters of the word; that ſuch Preachers muſt not aſſume that Honour before they were called, but muſt be ordained to that Holy Office, and ſent to us by God, and that except they are ſo ſent they cannot teach with effect.

I know it has been objected againſt my Lord of *Sarum*, that in his learned Articles he ſeems to favour that ſuppoſed opinion of that Archbiſhop, by telling us, that if a company of Chriſtians find the publick Worſhip defiled where they live, and do not know where they may conveniently worſhip God in a regular way, in ſuch Caſe if they ſubmit to thoſe who are ordained to the lower Functions, or by a common Conſent ſet up one of their own number to be their Miniſter, and ſhould from ſuch a beginning grow up to a regulated Conſtitution, tho' they are quite out of all Rule, yet if the neceſſity is real, even our Church did for above half an Age, after the Penning thoſe Articles, acknowledge a Foreign Church thus conſtituted to be a true Church as to the Eſſentials, notwithſtanding it was irregularly formed, and continued ſtill to be an imperfect State.

From which Paragraph 'tis inferred, that if a Miniſter ſhould be thus ſet up without Ordination by a Biſhop, this would be to lodge an original power in the People, in favour of thoſe who diſſent from Epiſcopacy.

(c) Rights of the Chriſtian Church, fo. 178.

I ſhall not enquire how far this may be allowed in Caſe of abſolute neceſſity, tho' 'tis very improbable that ſuch a Caſe can ever happen, becauſe Biſhops being ſet over the Church by the appointment of God himſelf, he will never ſuffer them to turn all Hereticks at once, but ſome will ſtill remain Orthodox, to whom thoſe Perſons who are qualified may reſort, to have their Epiſcopal power communicated to them.

But as for the quibble that which is out of all Rule can never grow up to a regulated Conſtitution, it ſeems to me to be a very poor Witticiſme, for every one knows that the Pagans who adore falſe Gods have Rules and Orders in their ſolemn acts of Worſhip, and ſo from a wrong Foundation have grown up to a regulated Conſtitution, tho' they are out of the true Rule by which the Church of God is governed.

Having ſaid thus much as to the neceſſity of Ordination, and in whom the power to ordain is Lodged, I ſhall proceed to ſhew what is required by the Law of thoſe who are to be ordained.

What is required of thoſe who are to be Ordained.

And firſt I ſhall take notice of the (*c*) Canon, which requires that no Man ſhall be ordained without a Title, and becauſe ſome Perſons may not apprehend what is meant in this place by the word Title, I ſhall explain what it is.

A Title, as it relates to the Clergy, was originally no more than entring their names in the Biſhops Roll, and then they had Authority to aſſiſt in the Miniſterial Functions amongſt the Preachers of that Dioceſs, and they had a right to have a ſhare out of the Common Stock or Treaſury of the Church.

But ſince Churches were Built, and Dioceſſes divided into Pariſhes, a Title is now an aſſurance of being employed to Officiate in ſome place of Divine Worſhip; for by the Canon (*d*) no Man is to be ordained *unleſs he is to be a Curate or Incumbent, or to have a Miniſters place in ſome Church, or unleſs he is Fellow of ſome College in our Univerſities, or Maſter of Arts of five Years ſtanding, and liveth there at his own Coſts; and that the Biſhop who ordains a Clerk without a Title ſhall keep him till preferred to ſome Benefice.*

In conformity to this Canon, Archbiſhop *Laud* ſent *Letters* to all his Provincial Biſhops, requiring them not to admit any Perſon into Orders, but thoſe who had a Title for their Maintenance, in which *Letters* he declared what ſhould be a Title.

(*c*) Canon 33. (*d*) Canon 33.

A Preſentation to ſome Eccleſiaſtical preferment, a Certificate that he is provided of ſome void Church; a Grant of ſome Petty Canons Place, or the like, in a College or Cathedral Church; a Fellow of ſome College of our Univerſities, or a Chaplain there; a Maſter of Arts of five years ſtanding, *&c.* or if the Biſhop who ordains the Clerk intends ſhortly afterwards to admit him to ſome Benefice or Curacy then void.

Mr. *Prynn*, who found fault with every thing either ſaid or done by that Archbiſhop, (*e*) tell us, that this ſeemed very fair *primâ facie*, but that there was *anguis in herba*, becauſe neither a *Lecturer or Chaplain to a Nobleman* was allowed by the Archbiſhop to be a Canonical Title, and that by this means young Divines would be made more dependant on Biſhops than on the Lords or Commons, which is a falſe Suggeſtion, for their right of Preſentation was not impeached by thoſe Circular *Letters*, or any thing therein contained.

There is another Canon (*f*) which prohibits Biſhops to admit any Perſon to Orders, who is not of his own Dioceſs, unleſs he is of one of our Univerſities, or bring Dimiſſory Letters from the Biſhop in whoſe Dioceſs he reſides.

And by the Statute 13 *Eliz. cap.* 12. he who is to be ordained Prieſt, muſt bring a Teſtimonial from four Perſons (known to the Biſhop to be of ſound Religion) of his Life and Doctrine, that is, as to his Manners, for the chief things to be enquired into are, whether the Perſon be *comendandus ſcientia & moribus*, and the Biſhop himſelf is the proper Judge as to his Learning, but he muſt be directed as to his Manners, by the Teſtimonial of other Perſons.

I ſhall now proceed to ſhew the ancient form of ordaining Prieſts and Biſhops, but it will be a very difficult undertaking to give a true Account of the form of Ordinations in the Primitive Churches, becauſe many of the Regiſters of thoſe Churches were Deſtroyed by the Perſecuting Heathens:

However, I ſhall give a fair Account of thoſe Forms in the Latine Church, which I find in *Morinus*, who has Publiſhed the moſt ancient Rituals of that Church, by which it will appear how free Ordinations were from Superſtition at that time, which is about the beginning of the ſixth Century, and what inſignificant Ceremonies and Rites have been ſuperadded to them ſince that time.

The Ordination of a Prieſt.

Thoſe Rituals tells us, That the form then uſed was for the Biſhop to bleſs the Prieſt to be ordained, laying his Hand

(*e*) Canterb. Doom. 384. (*f*) Can. 34.

on

on the Priests Head, and that all the Presbyters present were to hold their Hands on his Head, near the Hand of the Bishop, and at the same time.

Then they prayed for him that God would multiply his Heavenly Gifts, and pour forth the Holy Ghost upon him.

Then followed the Consecration Prayer, *viz.* That God who set up the High Priests to rule the People, did afterwards choose Priests of an inferiour Order to assist them, that he infused into the Sons of *Aaron* some of that fulness which was in their Father, that their Ministry might be sufficient both for the Sacrifices and Sacraments, that the same God did likewise add assistants to the Apostles who taught the true Faith, therefore they beseeched him to grant to the Person then to be Ordained the Dignity of the Priesthood, *&c.*

Then they all joined in one Prayer of Consummation, that the Person thus Consecrated might obtain the Blessing of the Priesthood, and the Gifts of the Holy Ghost, *&c.*

And in the last place there was a Prayer of Benediction, *viz.* that God would Bless his Servant who was thus dedicated to the honour of the Priesthood, that by his Life and Conversation he might prove himself to be instructed in those Doctrines which St. *Paul* delivered to *Timothy*, and that he might meditate on the Law of God both in the day and night, and believe what he read, and teach what he believed, *&c.*

I do not find that any particular words were used by the Bishop when he laid his hand on the Priests Head till some Ages afterwards, and then these words were enjoined, *viz.* *Receive the Holy Ghost, whose sins you remit are remitted to them, and whose sins you retain they are retained.*

In latter Rituals the giving the *Vestment* was added, and the anointing the Hands of the Priest, and a particular form of Blessing them, and then the anointing his Head.

Afterwards there was another Ceremony added in putting on the Vestment, which was usually done by the Bishop, saying these words, *viz.* *Take the yoak of God for 'tis sweet, and his burden is light.*

Then the *Casula* was put on and these words were aded, *viz.* *Let the Lord cloath thee with the robe of innocence*, then the *Paten* was delivered with the *Host*, and the *Cup* with the *Wine*, and these words were pronounced, *viz.* *Do thou take power to offer Sacrifices and to celebrate the Mass as well for the living as the dead.*

And lastly, the Bishop made a Cross on the Priest with *Oyl* and *Chrisme* and kissed him, and this was the manner of Ordaining Priests.

Ordination of a Bishop.

I am now to shew the ancient form of Ordaining a Bishop, this was an Office not limited to any constant method, but received alterations in several Ages.

At first the People were admonished how necessary it was for one Bishop to succed another, and they being certified that the Clergy had chose a Successor, therefore they were desired to approve such Choice.

Then followed some Collects to this effect, *viz.* That God would give this Grace to this his Servant whom he had appointed by the Suffrages of the People to be raised from the Seat of the Elders to be placed with their Princes, that he being now a Governor might not be lifted up, but as he was greater so he might be more humble, *&c.*

Then there was a Prayer of Consecration, that God would give Grace to his Servant chosen to the Ministry of the High Priesthood, that whatever his Garments formerly signified in the curiosity of the Workmanship might appear very bright in the manners and behaviour of the Bishop elect, that God would give him an Episcopal Chair to govern the Church, and that he would be unto him both Authority and Power, and multiply his Blessings and Grace on him that he might be fitted by his Gifts to implore his Mercy, *&c.*

Then followed some Collects and Prayers for the new Bishop.

In another Ritual Some questions were asked of the Bishop, *viz.* whether he is Temporate, Humble, Affable, and learned in the Scriptures and Ecclesiastical Doctrines, *&c.* and after this Examination two Bishops were to lay the Gospels on his Head, and one pronouncing the Blessing, all the Bishops present were likewise to lay their hands on his Head.

Then the Patten with the Host and the Cup with the Wine was given to him, in these words, *viz. Receive power to offer Sacrifice*, and his Hands and Head were anointed with Holy Oyl.

Afterwards two new Rights were added, *viz.* the giving investiture by a *Ring* and *Staff*, the Ring was given with these words, *viz.* That he would be mindful of the Ecclesiastical Wedding, and the love of God in that day he obtained the Honour to be a Bishop, receive therefore the Ring and Seal of Discretion, *&c.*

In giving the *Staff* these words were used, *viz.* Receive the *Staff* the sign of the Sacred Government that you may strengthen the Weak, confirm the Doubtful, and correct the Wicked, and afterwards it was blessed in these Words.

Tu Baculus noſtræ & rector per ſecula vitæ
Iſtum ſanctifica pietatis jure Bacillum
Quo mala Sternantur quo ſemper recta regantur.

Then there was another new Rite added, which may be found in the *Roman* Pontifical, and that was the giving the Goſpel in theſe words, *&c. Receive this Goſpel and go and teach all Nations.*

Then another Rite was added of putting the *Chriſme* upon the *Thumb*, and a Mitre on his Head, till at laſt it was made a Sacrament.

From all which it appears that the ancient form of Ordaining Presbiters was by *impoſition of Hands*, which was only a deſignation of the Perſon, and by a Conſecration Prayer, of which there was no ſet Form, for every Biſhop had liberty to uſe what Prayer he thought fit, ſo as it contained the ſubſtance of the Benediction.

'Tis true, the words *receive thou the Holy Ghoſt, &c.* are in none of theſe ancient Rituals they are in the *Roman* Pontifical, but if other Churches did alter or ſuperad to thoſe ancient Forms the Church of *England* hath equal power to make her own Ritual in point of Ordination.

Therefore our Reformers rejected all thoſe inſignificant forms of bleſſing the hands of the Prieſt, and anointing them, and his Head, the giving the conſecrated Garments, and the Patten and Cup, and many other Ceremonies, and in the beginning of the Reformation this amongſt the reſt of the Divine Offices was thought fit to be reformed, and for that purpoſe *Anno* 3 *Ed.* 6. a Bill paſſed both Houſes of Parliament purporting that ſuch Forms and no other ſhould be uſed, which ſhould be ſet forth by ſix Biſhops and ſix other Divines to be commiſſioned by that King under his Broad Seal, and accordingly in the next Year he appointed twelve Commiſſioners, of whom *Heath* then Biſhop of *Worceſter* was one, who always oppoſed the Reformation in Parliament, and they all (except that Biſhop) agreed to a Form as now uſed by *impoſition of hands and prayer*, and he refuſing was committed to the *Fleet*.

The Form now uſed for Ordaining a Prieſt is thus,

The Form now uſed for Ordaining a Prieſt.

After *Veni Creator* is Sung, and ſome Prayers, the Biſhop with the Prieſts then preſent laying their Hands ſeverally on the Prieſt's Head the Biſhop pronounces theſe Words.

Receive the Holy Ghoſt for the Office and Work of a Prieſt in the Church of God now committed to thee by the impoſition of our Hands, whoſe ſins thou doſt forgive are forgiven, and whoſe ſins thou doſt re-

tain are retained, and be thou a faithful diſpenſer of the Word of God and of his Holy Sacraments in the name of the Father, &c.

Then the Biſhop delivers a Bible to him with theſe words, *viz. Take thou authority to preach the word of God, and to miniſter the Sacraments in the Congregation where thou ſhalt be lawfully appointed.*

The learned Biſhop of *Sarum* (*a*) tells us, that ſome additions were afterwards made to this Form, and this was by asking the Prieſt ſeveral Queſtions, the firſt is,

(1.) Whether he thinks himſelf truly called according to the Will of God? *&c.*

(2.) Whether he believes that the Holy Scriptures contain all Doctrines ſufficient for Salvation?

(3.) Whether he will inſtruct the People out of thoſe Scriptures?

(4.) Whether he will be faithful to Adminiſter thoſe Doctrines and Sacraments?

(5.) Whether he will baniſh all falſe Doctrines?

(6.) Whether he will be diligent in Prayers and reading the Scriptures, and in his Studies, laying aſide the Study of this World?

(7.) Whether he will be diligent to order himſelf and Family according to the Doctrine of Chriſt?

(8.) Whether he will maintain and promote Quietneſs, Peace, and Love amongſt Chriſtian People?

(9.) Whether he will obey his Ordinary?

To all which Queſtions the Prieſt anſwers in the Affirmative; but if they were ſeriouſly conſidered before ſuch anſwers were made, eſpecially the firſt Queſtion, whether he thinks himſelf truly called according to the Will of God, that is, inwardly moved by the Holy Ghoſt to take upon him the Miniſtry, it might prove not only happy to the Perſon himſelf, but to thoſe who ſhall be afterwards under his Care.

But when the Anſwer is ſuddenly pronounced without any prævious Conſideration of ſuch important Queſtions, when a Prieſts enters into Orders only to entitule himſelf to a Benefice without any inward Call from the *Holy Ghoſt*, if this is the caſe (as I am afraid it too frequently happens) then he ſpeaks falſe in the Preſence of God even upon the moſt ſolemn occaſion, and this muſt be a ſham Dedication of himſelf to his Service, and 'tis very improbable that the God of Truth ſhould give any Bleſſing to the Services or Mi-

(*a*) Hiſt. Reform. 2 Part. 145.

niſtry

niſtry of ſuch a Perſon who leapt into the Church by a wilful and premeditated Lie.

The Form now uſed for Ordaining a Biſhop.

I ſhall proceed to ſhew the Form now uſed for Ordaining a Biſhop. One Biſhop muſt read the Communion Service, and then two other Biſhops are to read ſeveral Prayers, *&c.* and afterwards muſt preſent the Biſhop elect to the Archbiſhop, or to ſome other Biſhop lawfully Commiſſioned.

Then the Mandate for his Conſecration being produced, and the Oath of Supremacy taken, and that of Obedience to the Archbiſhop, and after ſome Prayers and Queſtions asked after the ſame manner as before in the Ordination of Prieſts, the Archbiſhop and Biſhops preſent muſt lay their hands on the Head of the Biſhop elect, the Archbiſhop pronouncing theſe words, *viz. Receive the Holy Ghoſt for the Office and Work of a Biſhop in the Church of God now committed to thee by the impoſition of our Hands, in the name of the Father,* &c. *and remember that thou ſtir up the Grace of God which is given thee by this impoſition of our Hands, for God hath not given us the Spirit of fear but of power and love and ſoberneſs.*

Then the Archbiſhop is to deliver a Bible to him ſaying, *Give heed unto Reading, Exhortation and Doctrine, and think upon the things contained in this Book,* and ſo concludes with Prayers.

But to return, we may ſee by the Form of Ordination of a Prieſt what is now become his Duty, and when he hath thus ſolemnly promiſed to perform it, I cannot ſee how he can relinquiſh it to the care of a Curate.

That learned Prelate before mentioned tells us, that the negligence and faults of ſome of the Clergy have brought that Scandal on the Church which could otherwiſe never ſink in its Reputation, for the People ſeeing ſuch plain and groſs faults in the Behaviour of ſome Miniſters are firſt prejudiced againſt their Perſons and then againſt the whole Church upon their account, ſo that ſuch Men are not only anſwerable for the Souls committed to their Charge, but for thoſe Diviſions which are amonſt us, which were chiefly occaſioned by their negligence and indiſcretion.

I ſhall conclude this Title with the Statute 13 *Eliz.* before mentioned, which tells us what Qualifications are required in the Perſon to be Ordained, *viz. That he muſt be learned in the Latine Tongue, and ſufficiently inſtructed in the Scripture, he muſt not be made a Prieſt unleſs he is able to give the Biſhop an ac-*

count

count of his Faith in Latine according to the Articles of Religion, or have a ſpecial Gift or Ability to be a Preacher.

And here I cannot but take notice of that Miniſter who ſubſcribed the 39 Articles thus, *viz. Ego ſubſcribo ad tricena novena articulorum fidei*, I believe this Man was neither moved by the Holy Ghoſt to take upon him the Miniſtry, nor able to give an account of his Faith in *Latin*.

'Tis probable that there was ſome Promiſe, Agreement or Bond, * or other Aſſurance made to procure an *Ordination* for him at firſt, and if ſo, the Perſon procuring it forfeits 40 *l.* and the Clergyman ſo Ordained 10 *l.* to be divided between the Queen and Proſecutor, and ſhall looſe any Eccleſiaſtical Living which he ſhall accept or take within ſeven Years after ſuch corrupt entring into the Miniſtry, and the Patron may preſent as if the Clerk was actually dead.

Organs, ſee *Church*.

Pardon.

MOST Cauſes of *Deprivation* may be remitted by a *Pardon*, unleſs where an Act of Parliament interpoſes and makes the Living void, as for inſtance, upon an Avoidance for not reading the 39 Articles, a *Pardon* cannot reſtore the party, becauſe by the Act the puniſhment (*a*) is the loſs of the Living, and 'tis not a contempt for which he might be indicted.

So where a Man is preſented by *Simony*, a general *Pardon* will not ſettle him in the Living, becauſe the Church was never full of him by reaſon of the *Simony*.

'Tis true, a *Pardon* will excuſe him from the forfeiture of the double value of the Benefice, and for that reaſon it can never be recovered by an Informer, but the Church always remains void wherever the Preſentation is by *Simony*.

My Lord *Hobert* (*b*) was of Opinion that tho' there is a Special Pardon of the very Act of *Simony*, yet the Church ſtill remains void, becauſe the Pardon cannot enable a Clerk to hold a Benefice whom an Act of Parliament hath diſabled, if it did it would be a Diſpenſation with the Act it ſelf, therefore if *Simony* cannot be pardoned where 'tis expreſſed in a Special Pardon *a fortiori*, it cannot be pardoned by any general words (*c*) in a Statute enumerating ſeveral Offences by name, and then pardoning them, *and all other Offences which*

* 31 Eliz. cap. (*a*) Cro. Eliz. 680. (*b*) Hob. 167. (*c*) Sid. 170.

th

the Queen can Pardon, tho' there is a ſudden Opinion to the contrary in one of our Books (*d*) where 'tis held that the word *Offences* includes all Crimes which are not capital.

If a Man is deprived for *Incontinency* during the Seſſions of Parliament, and that Offence is afterwards pardoned by the Parliament, the Deprivation is void, and the Clerk ſhall be reſtored to his Benefice, for the Pardon relates to the firſt day of the Seſſions.

So where one * *Burton* committed *Adultery Anno* 11 *Eliz.* for which he was deprived in the very next Year, then came a general Pardon dated 2d *April* 13 *Eliz.* by which the Crime of *Adultery* committed *before* the 14th day of *February* then laſt paſt was pardoned, it was adjudged that the Clerk ſhould be reſtored, for the Cauſe being pardoned which was the Foundation of the Sentence of Deprivation, that is alſo diſcharged, and the Pardon ſhall relate to the Fact.

But (*e*) this hath ſince been denied to be Law, and particularly by Juſtice *Windham* who was a very learned Judge, and it ſeems to be very reaſonable that the Sentence given before the Pardon ſhould not be made void by any relation, but only voidable till reverſed by another Sentence, and 'tis a forced conſtruction of a Pardon to make it relate and look back to diſcharge Offences committed many Years paſt, and for which Sentences of Deprivation had been ſolemnly given in proper Courts, and it would be very inconvenient to reſtore Criminals to Livings where other Perſons had been legally inducted upon ſuch Deprivations, and had enjoyed the ſame without any interruption for a conſiderable time.

Thus much for *Pardons* as they relate to *Deprivations*, there are ſome other Caſes where a general Pardon doth not help the Party, (*f*) as if he is ſued for *Slander* in the Spiritual Court, becauſe the Libel is *ad inſtantiam partis*, but 'tis otherwiſe where the Suit is *ex Officio*.

But where *Coſts* were taxed in the Spiritual Court nine Months after the Sentence given, and then came a general Pardon which related to a time before the taxing the Coſts that was held a ſufficient diſcharge.

(*d*) 1 Mod. 102. * 6 Rep. 13, b. Latch. 22. *My Lord* Coke *refers us to this* Burton's *Caſe in* Dyer, *but there is no ſuch Caſe in that Book, or any where elſe as he hath reported it.* (*e*) Sid. 164. (*f*) Cro. Eliz. 684.

Pariſhes.

IN the firſt Ages of Chriſtianity there were no fixed or determinate Boundaries for the Apoſtles and their immediate Succeſſors to exerciſe their Sacred Function, their Miſſion was to teach *all Nations* Baptizing them in the name of the Father, *&c.*

But when St. *Peter* had Ordained Prieſts, and *Cletus* had reduced them to a certain number, *Evariſtus* who was alſo Biſhop of *Rome* about the beginning of the ſecond Century aſſigned to each Prieſt his *Title*, that is, his *Pariſh* which was the place where the Converts uſually aſſembled to Worſhip.

Afterwards within the ſpace of forty Years, the new Converts encreaſed ſo faſt that *Higginus* who was likewiſe Biſhop of *Rome*, placed a Prieſt in every Pariſh or place where theſe Aſſemblies were, and the chief of thoſe Prieſts he called *Cardinal Presbyters*, which ſome think was the beginniug of thoſe who are now called *Cardinals* in the Church of *Rome*.

But this was above 100 Years before any limits were ſet to thoſe Pariſhes, for that was done by Pope *Dionyſius* at *Rome*, who allotted Churches to particular Presbyters, and was the firſt who divided the Weſtern Dioceſs into Pariſhes, in which the reſpective Prieſts were to have a certain and determinate Right to exerciſe their Functions, and to receive the Profits due to the Church ariſing within thoſe Limits.

The Churches wherein theſe Presbyters preached to the People were built in the moſt convenient places for propogating Chriſtianity, but chiefly in Cities and great Towns, and therefore the diſtribution of them to the Presbyters related, at firſt, to the City of *Rome*, which was done before by his Predeceſſor *Evariſtus*, but thoſe Churches being taken from the Chriſtians during their Perſecution by *Valerian* were reſtored by the authority of this *Dionyſius*.

But the dividing Dioceſſes into Pariſhes related almoſt wholly to the Country, which happened thus:

The *Romans* had in every City a Civil Magiſtrate, who was called *Defenſor Civitatis*, whoſe Office was to execute Juſtice both in the City and Subburbs, and within other Villages contiguous to the City and within its Juriſdiction, and as they had ſuch a Civil Office, ſo likewiſe there was a Biſhop in every City, who was ſuperintendent over the affairs of the Church, not only within the Walls of the City, but in the adjoining Vills.

But the number of Chriſtians encreaſing, it was too great a work for the City *Presbyters* to exerciſe their Function both in the Cities and Villages, and therefore this Pope and other Primates following his Example, ſettled diſtinct *Presbyters* in thoſe and other Villages and Towns within their Dioceſſes, and limited the Boundaries thereof, which were called Pariſhes.

'Tis true, the word *Parochia* was by the ancient Writers uſed in a larger and more comprehenſive Senſe, for the Churches of *Alexandria*, *Carthage*, *Corinth*, *Epheſus*, and *Jeruſalem* were called Pariſhes, but then it was not only a particular City that was comprehended by that word, but all the Towns and Villages near that City within which Circuit there were many Churches and Congregations of Chriſtians.

This appears by *Euſebius*, who tells us that *Lætus* was Preſident of *Alexandria* and of the reſt of *Ægypt*, but that the Superintendency *Parochiarum* belonged to *Demetrius*, who was not only Biſhop of the Churches in that City, but alſo *Parochiarum*, that is, of all the Churches where *Lætus* had the Civil Government.

In another place he takes notice that *Demetrius* was Biſhop *Parochia*, that is of the whole Church of *Alexandria* and *Epiphanius* relates that there were many *Pariſhes* at that time within that City.

So that the word *Parochia* in its primitive acceptation ſignified a Dioceſs, and that was ſuch a part of the *Roman* Empire which was governed by a Lieutenant ealled *Vicarius*.

Afterwards when the Church borrowed the word of the Civil State, it ſignified that Diviſion which was within the Juriſdiction of a *Primate*, and that was as large as the Civil Dioceſs, but as the word left its Latitude, and was confined to the limits of a Country Pariſh, ſo likewiſe the word Dioceſs came to be reſtrained to that which was called a *Pariſh* before.

But with us here in *England*, for the firſt 500 Years after Chriſt there were no particular *Pariſhes*, for the Biſhop had the Government of the whole Dioceſs, and the Revenue thereof was paid into this Treaſury, and he aſſigned a proportion to every *Prieſt* who officiated in the Churches, which was to be for their Maintenance, ſo that at firſt thoſe who are now *Pariſh Prieſts* were only Curates to the Biſhop.

When Chriſtianity began to ſpread, by the Converſion of the *Saxons* from Paganiſme, many Churches were built by Biſhops, and ſome by Laymen; but the Biſhops always ſettled the Endowment, which was uſualiy done by reſerving a certain

tain portion of the Profits, which before that time were paid into the Common Stock or Treaſury of his Dioceſs, and annexing it to thoſe Churches for the maintenance of the Prieſts who officiated therein, which Portion thus reſerved was to ariſe within certain limits ſet out likewiſe by the Biſhop himſelf for that purpoſe, and this was done at the Dedication of the Churches to ſome Saint.

Theſe limits were appointed according to the circumſtances of Times, Places and Perſons, within which the Clergy were ordered to Adminiſter their Spiritual Offices. 'Tis true, St. *Auſtin* made uſe of ſome of the *Britiſh* Churches; and when the *Danes* Ruled here ſome of thoſe old Cathedral Churches were ſtanding, and ſome alſo of a ſecond Rank, which had right of Burials and Baptiſme, and were endowed with Tithes ariſing within certain Precincts, which were ſo large in the time of the *Saxons*, becauſe the Churches were but few, that Lords of Mannors built more on their own Lands, for the conveniencie of themſelves and their Tenants; and by the Biſhops appoinment had a ſettled Miniſter amongſt them, who was to take care of the Souls living within ſuch a Diſtrict, which afterwards became a Pariſh.

And by the way, this may be a reaſon why ſome Pariſhes are intermixed with others at a great Diſtance. For where the Lord of a Mannor built a Church and endowed it with his own Demeſnes, 'tis probable that ſome of theſe Demeſnes might lay beyond the Bounds of the new Pariſh, and contiguous to another far diſtant.

But the firſt Diviſion of Dioceſſes into Pariſhes here in *England*, was made by *Honorius* Archbiſhop of *Canterbury*, *Anno* 622. and in the Reign of King *Edwyn*, within which Pariſhes certain Prieſts were to be maintained by the Tithes ariſing there, and by other Church Duties which they might take in their own Right:

This is agreed by Archbiſhop *Parker*, Mr. *Cambden*, and by Biſhop *Godwin*, who Wrote the Life of the ſaid *Honorius*, who all affirm that he was the firſt who divided his Provence into Pariſhes:

And of this opinion was that Learned Antiquary Sir *Henry Spelman*, but he confeſſes that very few Authors take notice of thoſe ſmall Pariſhes in thoſe Ages, for the whole Dioceſs was then comprehended by the word *Parochia*, and this agrees with (*a*) Mr. *Selden*'s opinion.

(*a*) Hiſt. Tythes, 256.

We

We have a farther Teſtimony from our Hiſtories, that there were Pariſhes here in the time of *Honorius*, for *Ethelbert* King of *Kent* having committed great Spoils there, and ruined the Church of *Putta*, who was then Biſhop of *Rocheſter*, that good Biſhop fled into *Mercia*, to ſee whether the Biſhop of that Kingdom would be more Merciful than *Ethelbert*.

Sexwulph was then Biſhop of that Dioceſs, which was the largeſt of the *Heptarchy*, (*b*) but he did not think fit to relieve his Brother out of the Common Treaſury of the Church, becauſe he was a Biſhop, but rather gave him a Church with the Poſſeſſions, which muſt be the Glebe and Tithes, and upon this he lived the remainder of his days, ſo that there was a Pariſh Church Endowed at that time.

And this appears a little plainer by King *Edgar*'s Laws, which began with Eccleſiaſtical Canons, concerning the Immunities of the Church, and they tell us at what times Tithes ought to be paid, and how to be recovered.

'Tis true, thoſe Laws were made 300 years after *Honorius* lived, and one would think that in all that time we might find a plainer Evidence for the Parochial Right of Tithes.

But above 50 Years after this, 'tis very plain by King *Canutus*'s Laws, *viz.* that the firſt Fruits of Corn which were payable yearly on St. *Martin*'s-day, ſhould be paid by the People to that Church in the Pariſh where they dwell; and this was long before the *Lateran* Council, which I ſhall mention hereafter.

From all which, 'tis certain, that in thoſe days Churches were built within the Precincts of ſome larger Pariſhes, and that the limits of ſuch Pariſhes were always appointed by the Biſhop, who, tho' he might be guided in ſettling the Boundaries by the extent of the Founder's Lands, yet it could not be done without his Conſent, and that was the reaſon a Canon was made for the Conſecration of new built Churches by the Biſhop himſelf, becauſe none ſhould be Built or Endowed without his Privity.

If the Biſhop gave the new Church a right of Burial, in ſuch Caſe the Lord of the Mannor might (with his Approbation, and not otherwiſe) give ſome part of the Tithes to that Church, which before were due to the Mother Church, but if the Biſhop would not allow the new built Church ſuch a Right, then it remained a Chappel; and if the Lord of that Mannor would have a Curate there, he ought to maintain him at his own Charge, for he was to have no part of his Tithes, for they were due to the Mother Church.

(*b*) Bede Lib. 4. fo. 167.

'Tis

'Tis true, many of these Districts within which new Churches were Built, did afterwards become Parishes, but even at this day the right of the Mother Church is still preserved in several Places, I mean in respect to the Tithes, two Parts whereof arising out of the Lands of the new Parish, are still paid to the old Church standing in the first Division of Parishes, and this is where the Bishop did not think fit to allow any more than the third Part to the new Erected Church.

'Tis a Common opinion amongst Civilians and Lawyers, that there was no Parochial Right of Tithes before the Council of *Lateran*, (*c*) but that every Man might give his Tithes to what Church he would; this Council was held under *Alexander* the Third, in the fifth Year of our *Hen.* 2. but beeause my Lord *Coke* could find no such Decree made by that Council, he thinks it was settled by a Decretal of *Innocent* the 3d.

But this must be a Mistake, and probably it was first occasioned by our famous Canonist *Lyndwood*, (*d*) who tells us, that before that Council *bene potuerunt Laici decimas in feudum retinere & eas alteri Ecclesiæ dare*, but certainly he did not mean Parochial Tythes, but such which the Laiety held in *feudo*, that is, which were granted to them from the Church, and such they might give to what Church they would.

If my Lord *Coke* had looked over that Pope's Epistles, he might have found one in favour of *Lyndwood*'s opinion, but it was never any part of the Canon Law, it was only Written to enforce those Laws made in the *Saxons* time for the Parochial payment of Tithes, which had been neglected by the *Normans*; and tho' restored by the Charter of *Hen.* 1. yet those Laws were seldom put in Execution till revived by *Adrian* the 4th. who was an *Englishman*, and the Customary payment enjoyned to those Churches where Due.

The aforesaid *Lyndwood* who lived in the Reign of *H.* 5. hath given us a Catalogue of the chief things in which the Spiritual Court had Jurisdiction, and amongst the rest he mentions the *Bounds of Parishes* for one concerning which we have several cases in our Law.

If the *Bounds of a Parish* (*e*) come in Question in that Court between a Parson and Vicar, tho' the Parson is an impropriator, yet it shall be tried in the Spiritual Court, and no prohibition shall go, as for instance, if there is a Vill in a *Parish*, and the Vicar hath the Tithes of the Vill, and the impropriator hath the Tithes of the rest of Parish, and the question

(*c*) Lynd. 81. *b.* Seld. of Tythes, 293. 2 Inst. 641. Dyer 84. Cro. Car. 422. Palm. 220. (*d*) Lyndw. 117. (*e*) 2 Rol. Abr. 312. no. 7.

between

between them is, whether the Lands out of which the Vicar claims Tythes are in the Pariſh or Vill? this ſhall be Tried in that Court; the Reaſon may be, becauſe the Conteſt is between Spiritual Perſons, and the Right of Tithes is only in Queſtion, but this would not paſs for a Reaſon in a parallel Caſe, between a Clergyman and Layman, (*f*) where the Vicar ſued for Tithes, and the Defendant ſuggeſted a *Modus* payable to the Parſon, here the Conteſt was between the Vicar and Parſon, who are both Spiritual Perſons, yet a Prohibition was granted.

So if there are two Vills in a Pariſh, and a Queſtion ariſes concerning the Boundaries of thoſe Vills, (*g*) it ſhall be Tried in the Spiritual Court; but the Law is not the ſame where the Queſtion is concerning the Boundaries of a Pariſh, between a Layman and a Clergyman, for if a Suit is brought for Tithes ariſing *inter loca Decimabilia* of ſuch a Pariſh, (*h*) and the Defendant ſuggeſts that the Lands are in another Pariſh, and that he had paid Tithes (*i*) to the Parſon there, this ſhall be Tried at Law, and the Reaſon is, becauſe the Inheritance of the Land out of which the Tithes ariſe may be in Queſtion, as if I hold the Lands as compriſed in a Fine lying in ſuch a Pariſh, under which Fine I Claim, and the Spiritual Court ſhould determine that it lies in another Pariſh, this may indanger the Inheritance.

So where there was a Preſentment *ex Officio* againſt a Man, (*k*) for not coming to his Pariſh Church, and he Pleads that it was not his Pariſh Church, and that he frequented another, a Prohibition ſhall go.

But the Boundaries of Pariſhes being now ſettled by Cuſtom, care is taken to preſerve them by Annual Perambulations.

It hath been a Queſtion what ſhall be reputed a Pariſh within the Statute 43 *Eliz.* for relief of the Poor.

As for Inſtance, *Hinkly* was an ancient Rectory, and had an ancient Church; (*l*) *Stoke* was an ancient Village, and parcel of the Rectory of *Hinkly*, that from the time of *Hen: 6.* there had been a Church likewiſe at *Stoke*, and that it was reputed as a Pariſh, and that the Inhabitants thereof had all Parochial Rights, and Churchwardens, and this made it a Pariſh.

So where the Village of *Tateridge* was anciently parcel of the Pariſh of *Hatfeild*, (*m*) and the Tithes there ariſing were

(*f*) Sid. 332. (*g*) 1 Lev. 78. (*h*) Cro. Eliz. 178, 228. 2 Roll. Abr. 282 291. (*i*) 1 Roll. Rep. 332. (*k*) 13 Rep. 17. (*l*) Cro. Car. 92. (*m*) Cro. Car. 394.

paid to the Parſon of *Hatfeild*, who always found a Curate at *Toteridge*, but that at the time of the making the Statute *Tateridge* was a Pariſh in Reputation, and had Churchwardens and Overſeers of the Poor, and had made Rates, which were Collected and Levied by their own Officers, that it had likewiſe all Parochial Rights, and never contributed either to the Poor of *Hatfeild*, or to the Repairs of that Church, or joyned with them in any Aſſeſſment, this made it a Pariſh diſtinct from *Hatfeild*.

But making Rates alone, without having other Parochial Rights, (*n*) will not make it a Pariſh, tho' there was a Chappel there before the making the Statute, and tho' Divine Service was Read there at that time.

Patron. See *Preſentation.*

Peculiars.

THOSE Pariſhes and Places are called *Peculiars*, which are exempted from the Juriſdiction of the proper Ordinary of the Dioceſs where they lie, both as to Probate of Wills and Granting Adminiſtrations, *&c.* and theſe are diſtinguiſhed into ſeveral ſorts.

(1.) Royal *Peculiars*, which are the Queen's free Chappels, and are under Her immediate Viſitation, as She is ſupreme Ordinary. As at *Weſtminſter*, (*o*) when a Prebend of that Church is void, She may Collate any Perſon by Her Letters Patents, and by virtue thereof he will be Entituled to the Poſſeſſion, without Inſtitution or Induction, and he cannot be deprived by any Eccleſiaſtical Authority, but by the Lord Chancellor or by Commiſſioners appointed under the Great Seal for that purpoſe, (*p*) and if he Reſigns, it muſt be to the Queen.

(2.) The *Peculiars of the See of Canterbury*, And this is an ancient Privilege belonging to that Archbiſhop, that wherever he had any Lands or Mannors, they were always exempted from the Juriſdiction of the Ordinary of the place, and made peculiar to the Dioceſs of *Canterbury*, (*q*) and we are told that he hath 57 of theſe *Peculiars* in his Provence.

(3.) *Peculiars belonging to Deans and Chapters*, Not by virtue of any Original Right which they had, but as derived from the Biſhop, who by reaſon of ſome ancient Compoſition gave up his Right to them.

(*n*) 4 Mod. 157. (*o*) 2 Roll. Abr. 356. (*p*) Dyer 294. (*q*) Godolph: Reportorium Canonicum 119.

Theſe

Theſe Compoſitions may now be loſt, (*r*) but where there hath been a conſtant Uſage for theſe Societies to grant Inſtitutions, in ſuch Caſes they may maintain their Right by Preſcription, and this is done by the *Dean and Chapter of St.* Paul's *in* London, *and by the Deans and Chapter of* Litchfeild *and of* York; but yet, if the Archbiſhop, in whoſe Provence ſuch a *Peculiar* is, ſhould grant Inſtitution, 'tis not void, but voidable, for he hath two Concurrent Juriſdictions, one as Superior ordinary to every Dioceſan Biſhop, the other as Superintendant over all Eccleſiaſtical things within his Provence, and therefore it ſhall be intended that he granted Inſtitution upon the failure of the *Dean and Chapter* to do it, and thus it will be good till avoided.

'Tis like the Caſe of a Bayliff executing a Warrant within a Franchiſe, (*ſ*) 'tis not void, becauſe the Franchiſe is ſtill in the County.

(4.) *Peculiars belonging formerly to Monaſtries, viz.* Thoſe Churches and Pariſhes which they had got appropriated to themſelves, either by Grants from the Biſhop or from the Pope.

But theſe at firſt were not wholly exempted from the Juriſdiction of the Biſhop, for he gave Inſtitution upon any Avoidances; and in the old Appropriations there was always a *Salvo juri Epiſcopali.*

'Tis true, no Appropriation could be made without the conſent or confirmation of the Biſhop or the Pope; thoſe who were Poor, and could not be at the Charge of a Papal Confirmation had always recourſe to the Biſhop, and he might expreſs his conſent in different Forms; for if he only confirmed the Grant of the Lay Patron, in ſuch Caſe he retained his proper Juriſdiction, and nothing paſſed by ſuch Confirmation, but the right of Patronage.

If he was made a Party and joyned in the Grant, then he gave up all his right to the Church; but if an Appropriation was confirmed by the Pope, that carried a Total Exemption from the Ordinary.

Pennance.

THIS is an Eccleſiaſtical cenſure of an Offender, and it is inflicted on him in order to make a change or renovation of his Mind, and 'tis made neceſſary for the Pardon of our Sins.

(*r*) 2 Rolls. Abr. 357. (*ſ*) 3 Lev. 211.

It consists in confessing our Sins to God in Prayer, in doing acts of Charity, Fasting, and in making Restitution to those whom we have Oppressed or Injured; and the Effects of it are a sincere Reformation of our Lives.

Before the Reformation the censures inflicted by Ordinaries on Offenders were such, as forbidding them the Sacraments, and all other Divine Offices to be performed where they were, except Baptism to Infants, and Extreme Unction to Dying Persons; and this Prohibition sometimes extended to whole Kingdoms, especially if the Liberties of the Church were Invaded, and not only so, but sometimes the Censure was, that the Offender should be Beaten, and this was called *Fustigatio circa Ecclesiam.*

It was a Question whether this punishment could be inflicted on a Gentleman, but I see no reason for the Doubt, when a King submitted to it; for our King *Hen.* 2. alighted from his Horse three Miles from *Canterbury*, and pulled off his Boots and went Barefoot to the Tomb of *Thomas Becket*, and fell before it, and was Whipped by all the Bishops and Abbots then present, and certainly there were many there to see this unusual Pennance; and not only so, but every Monk of Christ Church had a Lash at him, and afterwards he continued Fasting and Praying all that day and night, and would not suffer a Carpet to be put under his Feet to keep them from the Stones, but it happened to be in warm Weather, *viz.* on the 12th of *July* 1174.

About the middle of the second Century there were great Contests with the *Novatians*, whether those who were Baptized during the time of Persecution should be afterwards received into the Church, at last it was resolved that they should not be Totally excluded, but they were to stay some time before they were admitted to the Communion, that it might appear they were worthy of it by some acts of Repentance.

Those who accused themselves were sooner admitted to the Sacrament then others, because it was a true Sign that they were sensible of their Sins, and sorry to have offended, and therefore the Canons made a difference between such Persons and those who were proved Guilty, both in respect to the degrees and times of Pennance; and it was the chief business of some subsequent Councils to settle *Penitentiary Canons* in relation to this matter; for some Persons were kept in *Pennance* under great Severities, and for a considerable time, according to the circumstances of their Cases, and the nature of their Offences, and this was usual in the *Saxons* times, as it appears by the *Penitentials* of *Theodore* and *Bede*, where we may see that the

the meaſure of. Contrition was proportioned to the Circumſtances of Perſons and Actions.

The Biſhop of *Sarum* tells us, that *Confeſſion* at firſt was publick, that it was taken by the Biſhop or by ſome other penitentiary *Prieſt* appointed by him, but this was found to be inconvenient, for ſome Sins were Capital, and therefore, leſt ſuch ſhould be confeſſed publickly, it was allowed to make Confeſſions in private, and this began in the fifth *Century* in ſome Monaſteries, and in the preſence of a Confeſſor, and afterwards in many Churches where penitentiary *Prieſts* attended, who were very expert in this Buſineſs.

But tho' the Confeſſion was *private*, the Sins to be confeſſed were not of that Nature, for there was no Obligation to confeſs *private Sins*, the Canons were made againſt publick Offences, and ſuch only ought to be confeſſed that the Pennance might likewiſe be publick.

Afterwards *ſecret Sins* were confeſſed, and publick Pennance was enjoined for ſuch Sins, but this was quite laid aſide in the ſeventh *Century*, and particularly here in *England* by the Order of *Theodore* * Archbiſhop of *Canterbury*, but ſecret Pennance was every where practiſed and brought under Method and Rules by the ſame Archbiſhop, and in time it was cunningly managed by Friars, with ſo great Art, that they knew all the ſecrets of Mankind.

Commutation.] About the end of the eighth Century *Commutation* for Pennance began, and then Prayers, *Pater noſters* and *Maſſes* were enjoined inſtead of Faſting, and thoſe who had Money, were allowed to commute it to ſave Pennance, and this was received by the Prieſt under the innocent name of giving Alms.

Some indeavours were uſed at the beginning of the Reformation to retain the ancient Diſcipline of Pennance, but the People having been ſo long diſuſed from any open and publick Cenſures, this could not be effected without the concurrence of the Civil Power, which not being obtained, they let private Confeſſion drop, there being no command for it in Scripture, and inſtead thereof the Reformers ordered a general Confeſſion to be made in the Church.

But *Commutation for Pennance* is ſtill practiſed, for we are told that it agrees with the Cuſtoms uſed in the Eccleſiaſtical Laws, juſtified alſo by the Common Law, and by the Statute *Circumſpecte agatis* in the time of *Ed.* 1. and by the Statute *Articuli Cleri* in the time of his Son and Succeſſor *Ed.* 2.

* Burnet Expoſ. 278. Hiſt. Reform. 2 Pts. 66.

'Tis true, by the Statute *Circumſpecte agatis* it appears, that ſometimes a Corporal and at other times a *pecuniary puniſhment* was inflicted for Adultery, Fornication, *&c.* but the Statute *Articuli Cleri* diſtinguiſheth, *viz.* that where the puniſhment is *pecuniary*, and 'tis *demanded*, a Prohibition ſhall go, but if Corporal and the party will redeem it with Money, in ſuch caſe a Prohibition ſhall not go, and ſo is *Fitzherbert*, (*a*) but I do not find that the Judges obſerved this Law, for they frequently granted Prohibitions where the Offender was ready to give Money to commute for Corporal Puniſhment, inſomuch that *Anno* 15 *Ed.* 3. *cap.* 6. another Act was made, that the Miniſters of Holy Church ſhould not be impeached in the Courts at Law for *taking Money* (*b*) for redemption of Corporal Pennance.

But the King never conſented to this Act, therefore it was repealed in the ſame Year it was made.

So that the Ordinaries never refuſed *Money for Commutation*, and therefore *Anno* 45 *Ed.* 3. Complaint was made to the Parliament that they refuſed to do Juſtice by inflicting Corporal Puniſhments on Offenders, but inſtead thereof *took Money*, and this was grown ſo notorious, that *Anno* 1 *H.* 5. (*c*) another complaint was made againſt them for taking 40*s.* and ſometimes more, but never leſs to excuſe Adulterers from Corporal Puniſhments, and the Complainants prayed that it might be enacted, the Ordinaries ſhould forfeit ten times as much as they ſhould receive, the King anſwered that he would take care with the Biſhops to prevent this abuſe, which if they did not he would.

'Tis plain that *Commutation* was practiſed in this Kingdom when the Papal Power was very great, and that it was an artificial Contrivance to get Money from the Laity, but it can be no reaſon that becauſe it was uſed then it muſt be ſo now, for 'tis contrary to the ancient Diſcipline of the Church, which always *publickly* cenſured ſuch Perſons who were a ſcandal to it, and this may be the reaſon why the lower Houſe of Covocation *Anno* 1700 complained to the Biſhops of the ſcandal which was given by the non-obſervance of the Canons, and particularly in regard to *Commutations*.

(*a*) F. N. B. 53, *a*. (*b*) 2 Roll. Abr. 283. (*c*) Rot. Parl. 45. Ed. 3. No 24. 2 Roll. Abr. 216.

Penſions.

THIS is a certain ſum of Money paid in lieu of Tithes, and ariſeth either by ſome Decree made by an Eccleſiaſtical Judge upon a Controverſie for Tithes, by which they have been decreed to be enjoyed by one, and a *Penſion* inſtead thereof to be paid to another, or elſe it may ariſe by vertue of ſome Deed made by the conſent of the Parſon, Patron and Ordinary, and if ſuch Deed ſhould be loſt, and the *Penſion* hath been uſually paid for twenty Years, then it may be claimed by Preſcription, and recovered in the Spiritual Court.

'Tis true, my Lord *Coke* in his Paraphraſe upon the Statute *Circumſpecte agatis* (*d*) was of Opinion that it could not be recovered in that Court, becauſe Preſcriptions muſt be tried at Common Law, but he was of another Opinion in *Spratt* and *Nicholſon*'s Caſe, (*e*) where the Libel was for a *Penſion*, ſetting forth that *tam per realem compoſitionem quam per antiquam & laudabilem conſuetudinem ipſe & Predeceſſores ſui habuerunt & habere conſueverunt annualem penſionem*, &c. here was both a real Compoſition and Preſcription alledged, and yet no Prohibition was granted.

At the time of the Diſſolution of Monaſteries there were many of theſe *Penſions* iſſuing out of their Lands, and payable to ſeveral Eccleſiaſtical Perſons, which Lands were veſted in the Crown by the Statute 31 *H.* 8. but there is a ſaving in the Act to ſuch Perſons of the right which they had to thoſe *Penſions*, but notwithſtanding ſuch a general ſaving thoſe who had that right were diſturbed in the collecting and receiving theſe *Penſions*, therefore by another Statute made *Ann.* 34 H. 8. *cap.* 19. it was enacted, That *if any Penſion due out of the Lands of the diſſolved Monaſteries ſhould be* **wilfully denied** *by the occupiers of their Lands to ſuch Perſons who were ſeiſed thereof within ten Years before the diſſolution, in ſuch caſe upon ſuit brought for the ſame in the Spiritual Court, if the Defendant ſhould be convicted, the Plaintiff ſhall recover the vallue in Damages together with Coſts, and if the Suit is at Common Law he ſhall recover the like.*

Since the making that Statute, a Queſtion (*f*) happened, whether the Spiritual Court ſhould proceed where the *Penſion* was *never demanded*, and by conſequence could not be *wilfully*

(*d*) 2 Inſt. 491. (*e*) Godb. 196. (*f*) 2 Roll. Abr. 300. Plito. 6. 2 Cro. 217.

denied,

denied, but becauſe that Court had an original Cognizance of the matter, therefore a Prohibition was denied.

The reaſon is the ſame in caſes of *Preſcription*, (*g*) for a Penſion which muſt be tried in that Court, becauſe they have Cognizance of the principal matter, *viz.* of the *Penſion*, and that ſhall draw the acceſſary to the ſame Juriſdiction.

This agrees with *Fitzherbert*, (*h*) who tells us that the Parſon may proſecute his Suit for a *Penſion* by Preſcription either in that Court or at Common Law by a Writ of Annuity, but if he takes his remedy at Law he ſhall never afterwards (*i*) Sue in the other Court, becauſe he hath determined his Election.

'Tis true, Mr. *Syderfyn* (*k*) makes a *quære* of it, becauſe, both Juſtice *Windham* and *Twiſden* affirmed, that in the Reign of King *James* it was adjudged that a *Penſion* by Preſcription was recoverable only at Common Law.

But it hath ſince been reſolved that the remedy is proper (*l*) in either Court, that is, if the Preſcription is not denied, for if it is, a Prohibition ſhall go, and that muſt be tried at Law.

Laſtly, If upon the endowment of a Vicaridge, the Biſhop decreed, (*m*) that the Vicar ſhall pay yearly 20*l.* *de fructibus terræ*, this is a *Penſion*, and the Ordinary having appointed the payment as a Judge, the Suit to recover it ſhall be in the Spiritual Court.

But where there is no Incumbent, if the Patron and Ordinary make a grant of a Penſion there they charge an intereſt, and that muſt be ſued and recovered at common Law.

Pentecoſtals.

THESE were Oblations made by the Pariſhioners to their *Prieſt* at the Feaſt of *Pentecoſt*, which are ſometimes called *Whitſon Farthings*, but they were not at firſt offered to their *Prieſt*, but to the Mother Church, and this may be the reaſon that *Deans and Prebendaries* in ſome Cathedrals are entituled to receive theſe Oblations, and in ſome places the *Biſhop and Archdeacon* as at *Glouceſter*.

They were paid to the Mother Church at *Worceſter* before the Diſſolution, and when *H.* 8. endowed that Church after the Diſſolution he reſtored the *Pentecoſtals* to them.

(*g*) 1 Vent. 3. (*h*) F N. B. 51, b. (*i*) Hardres 230, 388. (*k*) Sid. 146. (*l*) 1 Vent. 320. (*m*) Cro. Eliz. 675.

The

The original of theſe Offerings might be either at the founding or dedicating of a Church, or at ſome other great Solemnity, and reſerved by the Biſhop by way of an agreement between him and the Founder, and ſettled upon the Epiſcopal See, and payable yearly at *Whitſontide*.

Afterwards when the Biſhop admitted a *Prieſt* to officiate in a new built Church, he might appoint the payment of *Pentecoſtals* to him who had his Maintenance before out of the common Stock or Treaſury of the Church, and this continuing for ſome time, the Secular Clergy have now a ſettled right to receive it where it hath been uſually paid.

Plenarty.

THIS is derived from the adjective *Plenus*, and 'tis a term uſed in Eccleſiaſtical Affairs, ſignifying that the Church is full of an Incumbent.

And this is made either by *Inſtitution* or *Collation*. 'Tis a *Plenarty* immediately upon Inſtitution (*a*) *as to the Spiritualties*, and 'tis good againſt a *common Perſon*, tho' not againſt the *Queen*, but this muſt be underſtood where the Preſentation is in Her, for in ſuch caſe there muſt be a compleat *Plenarty* by *Induction* (*b*) as well as *Inſtitution*, and therefore if She preſents, and Her Clerk is inſtitued, ſhe may revoke her Preſentation, and ſo make it void at any time before *Induction*.

But where ſhe hath no right to preſent (*c*) in ſuch caſe the bare Inſtitution of a Clerk of a common perſon without any Induction is a good *Plenarty* as well againſt her as all other Perſons.

If a Stranger ſhould preſent upon *her Right* (*d*) and his Preſentee ſhould be inſtituted and inducted, tho' this is no Plenarty to bar her, yet ſhe cannot lawfully preſent till the Incumbent is removed by a *Quare impedit*, for if a Perſon who had no manner of right preſented to a Church, and his Clerk was admitted and inſtituted, this by the common Law was ſuch a Plenarty that it put the right Patron out of Poſſeſſion, and he could not recover it but by a Writ of right of Advowſon, and even in ſuch caſe he could not remove the Incumbent, ſo that he certainly loſt his Preſentation *pro hac vice*, becauſe the Inſtitution was a judicial Act of the Biſhop, and the Law preſumes he will do no wrong.

(*a*) 4 Rep. 79. Poph. 133. Dyer 348. (*b*) 2 Roll. Abr. 349. 1 Leon. 156. (*c*) 2 Roll. Abr. 349. (*d*) 2 Roll. Abr. 349, 6 Rep. 49, b.

But

But the Statute of *W.* 2. provides a remedy againſt this inconvenience, and gives the Patron a *Quare impedit* to recover his Preſentation notwithſtanding ſuch a Plenarty *dummodo breve infra tempus ſemeſtre impetretur.*

So that Plenarty is now no good Plea to (*e*) *Quare impedit* unleſs the Incumbent had been in poſſeſſion for *ſix Months* before the Writ brought, for if the true Patron brings his Action within that time 'tis good.

But Plenarty for *ſix Months* (*f*) is not pleadable againſt the Queen, for ſhe may bring the *Quare impedit* at any time, *becauſe nullum tempus occurrit Reginæ*, (*g*) yet if a Title devolves to her by *Lapſe*, and the Patron preſents his Clerk by Uſurpation, who is inſtituted and inducted, *and enjoys it for ſix Months*, this is ſuch a Plenarty which deprives her of the Preſentation.

Plenarty by Collation.

There is another Plenarty which is made by *Collation*, and in ſuch caſe if a Biſhop collates who has *no right*, this doth not put the true *Patron* out of Poſſeſſion, becauſe 'tis only a Proviſion to ſupply the Cure till the Patron doth preſent, and that is the reaſon why a (*h*) Plenarty by Collation cannot be pleaded againſt the right Patron.

But ſuch a wrongful collation ſhall make a Plenarty, which will be a bar to any *Lapſe* to the Archbiſhop, and to the Queen, tho' 'tis no bar to the right Patron, and it likewiſe puts him out of poſſeſſion who hath a right to collate.

Laſtly, *Plenarty* or not ſhall be tried by the Biſhop's (*i*) Certificate, becauſe 'tis acquired by Inſtitution which is a Spiritual Act, but in a *Quare impedit* the *Plenarty* muſt be tried by a Jury.

Plurality.

THIS is where the ſame Perſon obtains two or more Spiritual Livings with cure of Souls, in ſuch caſe the firſt is void *ipſa facto* without any Sentence of *Deprivation*, and the Patron may preſent to it, for the Law enjoyns Reſidence, (*k*) and 'tis impoſſible that the ſame Perſon can reſide in two places at the ſame time.

At Common Law, and before the making the Statute 21 *H.* 8. the firſt (*l*) Living was void immediately upon taking the ſecond, but then it was at the Election of the Patron to take

(*e*) Hob. 322. Sid. 163. 2 Inſt. 360. (*f*) 2 Inſt. 361. (*g*) 7 Rep. 28. (*h*) 6 Rep. 29. 6 Rep. 50. (*i*) 6 Rep. 49. (*k*) 2 Roll. Abr. 360. (*l*) 4 Rep. 75. Moor. 542.

notice

notice of this Avoidance or not, that is, he might preſent if he would, but if he did not, yet no *Lapſe* ſhould incur, but now by that Statute he muſt preſent *within ſix Months* if the firſt Living be above the vallue of 8 *l. per Annum.*

It would take up a great deal of time to mention all the Councils which prohibited Pluralities, 'tis ſufficient to mention that the *Council of Trent* affirmed them to be the ſubverſion *totius ordinis Eccleſiaſtici*, and by another (*m*) Council, that it brings a ſcandal on the Chriſtian Church, and that 'tis an hindrance to the publick Worſhip, and to the good of Souls, and that it ſavours too much of a worldly Mind.

But if the Pope diſpenſed with a Pluraliſt, all theſe inconveniencies were remedied, and therefore before I treat of the Statute 21 *H.* 8. I ſhall take notice how the Law ſtood before that time in relation to this matter.

In the *Lateran Council* a Canon was made, that no Miniſter ſhould take two Pariſh Churches or two Dignities in the ſame Church, but this Canon had no effect, for the Ordinaries uſually granted Diſpenſations to take two or more Benefices with Cure.

About 60 Years afterwards *Cardinal Othobon*, who was Legate here from Pope *Innocent* the 4th, at a Council held in *London*, appointed that the Inſtitution to the ſecond Benefice ſhould be void, but in another general Council held at the ſame place, not long after another Canon was made, that upon taking the ſecond Living the Clerk ſhould be deprived of the firſt, and all power of Diſpenſation in ſuch caſes was taken from the Ordinaries, and *Lynwood* (*n*) tells us the reaſon, *viz.* becauſe they did not uſe it with Diſcretion, but the *Pope* had ſtill the ſame Power, for he knew how to uſe it better.

This laſt Canon was confirmed by Archbiſhop *Peckham*, and becauſe it did not mention *what vallue* the ſecond Living ſhould be, therefore the Law, before the making this Statute was, that if the ſecond Living was of never ſo little vallue, yet the acceptance of it avoided the firſt, and the Patron might preſent, and if the Incumbent conteſted the matter with him, then he was to be deprived of both.

But it ſeems the Pope who had the ſole power of granting Diſpenſations, made as bad uſe of it as the Ordinaries, for he made extravagant Grants to unworthy Perſons, and by this means thoſe Canons became uſeleſs.

(*m*) Council Paris. 6. cap. 49. (*n*) Lib. 3. cap. 18.

Then

Then it was a proper time to provide a remedy, and this was done by the Statute 21 *H.* 8. *cap.* 13. *viz. That if any Perſon having one Benefice with Cure,* &c. *being of the yearly vallue of* 8*l. or more, ſhall accept another with Cure, and be Inſtituted and Inducted into the Poſſeſſion thereof, that immediately after ſuch Poſſeſſion the firſt Benefice ſhall be void, and the Patron might preſent another, and that his Preſentee was to have the benefit of the ſame as if the Incumbent had died or reſigned, and that any Licenſe, Union or Diſpenſation to the contrary ſhould be void.*

'Tis true, the Statute is, that the Perſon muſt be Inſtituted and *Inducted* into the ſecond Living, but yet a bare Inſtitution without Induction will make an Avoidance, for otherwiſe a Man may get Inſtitution to ſeveral Benefices, and hinder other Perſons to be preſented, and by getting Sequeſtrations of the Profits, may not only defeat this Act but all Canons made againſt Pluralities.

So that a *Diſpenſation* after an *Inſtitution* (*o*) come too late, becauſe by the *Inſtitution*, the Church is full againſt a common Perſon, and therefore he cannot have a Diſpenſation *retinere* that which he had before.

I muſt agree with Sir *Simon Degg*, that this had been an excellent Law againſt Pluralities, and all Diſpenſations to obtain them if it had gone no farther, but there are ſo many Qualifications to be a Pluraliſt, that the power of Diſpenſation was only taken from the Pope and ſcattered (as he calls it) amongſt the Nobility, for there being about 4300 Benefices in *England* of 10*l. per Annum* in the Queen's Books, the Nobility can qualifie above 1000 Chaplains beſides thoſe of the Queen, and probably as many might be qualified by Birth and Dignities, which make the Act almoſt as uſeleſs as the Canons.

But ſome learned Men are of Opinion that ſuch Diſpenſations cannot ſatisfie a Man's Conſcience without a prævious Cauſe, and if any cauſe may be allowed to make a Pluraliſt, it muſt be where the Benefices are mean and are near together, and it ſeems to be clear that the Parliament had a regard to the poverty of ſome Benefices, becauſe the Act doth not make the ſecond Living void where the firſt is *under* 8*l. per Annum*, that is according to a valuation made *Anno* 26 *H.* 8. and then returned into the Exchequer, and now in the Firſt-Fruits Office, and not according to the real vallue, for the Livings which are worth 50*l. per Annum* are vallued in the King's Books at 8*l.* and no more, tho' ſome * Books are to the contrary.

(*o*) 2 Roll. Abr. 359. 4 Rep. 79. * Noy. 38. Cro. Eliz. 853.

And

And even in ſuch Caſe where the Livings are Contiguous, great care ought to be taken to put in able Curates, with a competent allowance, and the Rectors themſelves ought to take all opportunities to perform the Duties of their Function, notwithſtanding there are Curates to ſupply their Places, for 'tis the conſtant and neceſſary attendance on Parochial Cures, which is chiefly regarded by the Act, and this appears very plain, becauſe Dignities in the Church are not comprehended under the name of Benefices, with Cure, as Archdeaconries, Chancelorſhips, Chantorſhips, Deanries, Prebends in Cathedral or Collegiate Churches, Parſonages where there is a Vicar endowed.

But admitting a Clergyman hath a Diſpenſation to hold two Livings with Cure, *&c.* * and afterwards he accepts a third, if the Diſpenſation is particular, that is, if it expreſs the very Benefices which are diſpenſed to be retained, then if he hath no other Diſpenſation, the two firſt are Void, but if he hath only a general Diſpenſation to hold two Benefices, without naming them, then if he accepts a third the firſt is only Void.

Before the making this Act any Perſon might be deprived by the Eccleſiaſtical Law of his firſt Benefice, for taking a ſecond without a Diſpenſation, let the firſt be of what value it will, as hath been before obſerved. Now the Statute only provides that he who takes two Livings *above ſuch a Value*, ſhall have no Title to the firſt, ſo that it doth not alter the Eccleſiaſtical Law, nor take away any power which the Biſhops had before, if that had been intended there ſhould have been an expreſs Clauſe for that purpoſe, for no antecedent Rights can be taken away by Implications, and if ſo, the ancient Eccleſiaſtical Law is ſtill in force; and then if a Clergyman hath one Benefice *under the Value of* 8 l. *per Annum*, and accepts another *above that Value*, but without any Diſpenſation, tho' he is not puniſhable by the Statute, yet he may be deprived of the firſt by the Canon Law.

But if that Law is ſtill in force, yet the taking two Livings is not *malum in ſe*, 'tis only *malum quia Prohibitum* by thoſe Canons, and ſuch an Evil may be diſpenſed withal in order to ſome Publick Service, or for the Reward of Learning or Merit, eſpecially where the Maintenance is inſufficient, and this appears to be the ſenſe of ſome ancient Canons; for in the laſt Year of *Hen.* 3. a Canon was made that *circa Sublimes & literatas Perſonas quæ majoribus Beneficiis ſunt honorandæ cum ra-*

* Noy 142.

tio

tio poſtulaverit per ſedem apoſtolicum poterit diſpenſari duo Beneficia retinere.

And ſome of thoſe Canons allowed an Union in ſuch Caſes, which was no more than the Act of the Biſhop in uniting two Churches for the better ſupport of the Incumbent, and 'tis as reaſonable now that the Biſhop ſhould unite two ſmall Benefices for the maintenance of a Learned Perſon, who may be of publick Service to the Church; this is allowed by the Canons (*a*) of our Church, wich provide that a Diſpenſation may be Granted to a Perſon thought Worthy by his Learning, and able and ſufficient to diſcharge his Duty, that is, to one *who hath taken the Degree of Maſter of Arts in the Univerſities of this Realm, and who is a publick and Licenſed Preacher, ſo that he give caution to reſide on one of his Benefices for ſome reaſonable time in the Year, and that the ſaid Benefices are not more then* 30 *Miles aſunder, and ſo that there is a Licenſed Preacher in the Benefice where he doth not reſide.*

I ſhall now proceed to ſhew in what manner Perſons may be qualified to have Diſpenſations to hold two Livings; and that is, by

(1.) *Retainer,*
(2.) *Birth,*
(3.) *Dignity.*

As to the qualification by Retainer or Service you, may ſee it at large under the Title Chaplain, only here I ſhall take notice, that if a Lord or other Perſon doth retain his full Statute number, and likewiſe ſome more, thoſe ſupernumeraries are not qualified for a Plurality, tho' they ſhould be firſt preferred. (*b*)

So if any Peer ſhall have a double Capacity to qualifie Clergymen, as if a Baron ſhould be made Maſter of the Rolls he can qualifie only according as he is a Peer, and no more, for that is his beſt Capacity.

So that if the Eldeſt Son of a Peer retaineth Chaplains in the life time of his Father, who afterwards dies, ſuch retainer will not qualifie thoſe Men, becauſe the Son was not capable to do it at the time of the retainer.

By which it appears that the Perſon retaining muſt be capable thereof at the time of the retainer, and he muſt likewiſe continue in that capacity till his Chaplain is advanced, for if he dieth or is removed from his Office before that time, his qualification is determined.

(*a*) Canon 41. (*b*) Dyer 312. Moor. 277, 678. Cro. Eliz. 723, 859. 4 Rep. 90. Moor. 561.

But

But if a Baroneſs being a Widow, retains two Chaplains, (c) and Marries before either of them are preferred to a ſecond Living, this retainer is good, and the Perſon may have a Diſpenſation to hold ſuch a Living, tho' at the time of his accepting it the Baroneſs was not in the ſame Capacity as ſhe was at the time of the retainer.

And 'tis to be obſerved that theſe retainers (d) muſt be before the Inſtitutions to the ſecond Benefice, for if they come afterwards 'tis too late, becauſe the words of the Statute are, *viz. That it ſhall be lawful to purchaſe a Diſpenſation to receive and take two Benefices with Cure*, &c. which he cannot do after Inſtitution to the ſecond, becauſe the Church is then full as to the Spiritualties, and by conſequence he cannot receive what was his own before.

Qualification by Birth.] (2.) *Qualification by Birth*, And this is where the Clerk is Brother or Son of any Temporal Peer, or the Son of any Knight Born in Marriage, ſuch Perſons may have Diſpenſations to hold two Livings; ſo that the Son of a Knight hath in this reſpect a greater privilege than the Son of a Baronet, becauſe that dignity was not created when this Statute was made.

Qualification by Dignity.] (3.) *Qualification by Dignity* is, where Perſons are admitted to the degrees of Doctors and Batchelors in Divinity, or in the Civil Laws in either of our Univerſities.

In all thoſe Caſes where a Perſon is qualified by Service, he muſt carry his Teſtimonial or Retainer under the Hand and Seal of his Lord, to the Maſter of the Faculties, who is to make out Diſpenſation, and this muſt be Sealed afterwards under the Great Seal, and then he may apply himſelf to the Biſhop of the Dioceſs for Inſtitution, and not before; for tho' the Statute is, that the firſt Living ſhall be void when the Party is Inſtituted and Inducted to the ſecond, yet to avoid Inconveniencies it hath been held that the firſt Living is Void upon the Inſtitution to the ſecond; for otherwiſe a Man might be Inſtituted to ſeveral Benefices, not being able to ſerve the Cure of one.

Preaching.

WHEN the Heathens were firſt Converted to Chriſtianity, there was an abſolute neceſſity of Preaching; and that it might be performed with the greater Solemnity, it was

(c) 4 Rep. 118 b. 79. (d) 4 Rep. 77 b.

uſually

uſually done by Biſhops, eſpecially in the *African* Churches, and it was likewiſe ſo peculiar to the Biſhops of the *Gallican* Church, that they called their Office *Prædicationis Officum*; in the Royal Conſecration they were required to be diligent in Preaching, and *Charles* the Great was ſo ſtrict in enjoyning it, that he cauſed thoſe Biſhops to be depoſed who neglected this Duty.

I do not find that Presbyters were allowed to Preach in thoſe Churches, till the time of St. *Auſtin*, who uſually heard St. *Ambroſe* every Lord's-day, and he tells us that he accounted it the proper Office of a Biſhop to perform this Duty, but at laſt he obtained leave of *Valerius*, who was his Biſhop, to Preach before him.

This gave Offence to many other Biſhops, but it afterwards proving very ſerviceable to the Church, the Biſhops by degrees gave the Presbyters leave to Preach before them, and when an ill uſe was made of it they were forbidden again, as when the *Arian* Hereſie firſt began, the Presbyters of *Alexandria* were prohibited to Preach.

In the Church of *Rome* there was no Preaching at all, for if there had 'tis probable we ſhould find ſomething of it in the old *Roman Offices*, which are ſilent as to this matter.

'Tis true, *Cardinal Bona* tells us, that it was the interrupted Practiſe of the Church, from the Apoſtles to his time, for the Sermon to follow the Goſpel, but he brings no Proof that it was obſerved in the Church of *Rome*, or any where elſe; and *Sozomen* takes particular notice that it was the peculiar Cuſtom of that Church not to have any manner of Preaching * either by Biſhops or Presbyters till the time of *Leo* the great, about the Year 440. for he was Pope about the middle of the fourth Century, and was the firſt who performed that Office in that Church on ſolemn Occaſions.

I admit, that *Gregory* the great, who ſucceeded in the Popedom about 150 Years after *Leo*, in his Homilies on the Prophet *Ezekiel*, and on the Goſpels mentions, that ſome of the Biſhops of *Rome* were frequent Preachers, and this may very well conſiſt with what *Sozomen* had obſerved concerning that *Leo*, who Preached at firſt upon ſome ſolemn and publick Occaſion; but in *Gregory*'s time, who lived ſo long after him, it became an uſual thing.

As to us here in *England*, when the Biſhops lived with their Presbyters in the Cathedrals, they ſent them out to Preach as they ſaw occaſion, and where they were moſt likely to do ſervice to the Church; but when they became ſettled in their Cures, and were no longer Itinerary, they were required to be

* Lib. 7. cap. 19.

diligent

diligent in Preaching, and this Duty was enforced upon them by ſeveral Councils, as by a Council held at *Oxford*, *Anno* 8 *H.* 3. it was decreed, That *all Rectors ſhould Inſtruct their Pariſhioners in the word of God*, but this Decree was not regarded as it ought, for in the very next Reign we find that great complaint was made in a Provincial Council of the Ignorance of the Parochial Clergy, (*e*) that they were not capable of Preaching, and probably it might be neglected by them, becauſe a certain Order of Men called the Preaching Fryars had taken it up, ſo that by this Council the Secular Clergy were only enjoyned to read an Expoſition on the Creed, on the Ten Commandments; the Two Precepts of Charity; the Seven Works of Mercy; the Seven deadly Sins; the Seven principal Virtues, and the Seven Sacraments, and this only four times in a Year.

It was *Wickliffe*, who by frequent Preaching revived this Duty in the minds of the People, ſo that a new Provincial Conſtitution was made by Archbiſhop *Arundel*, enjoyning the Parochial Clergy to Preach again, and giving Authority to thoſe Mendicant Fryars who had no ſpecial Cures, that they might Preach in *Eccleſiis & plateis*, but not without leave from their Superiors, but the Secular Clergy were to Preach to their own Pariſhioners, without any maneer of Licenſe.

'Tis true, if any one Preached in a ſtrange place, he was firſt to be examined by the Biſhop, and if he was *idoneus tam moribus quam ſcientiâ*, then he might ſend him to as many Pariſhes as he thought fit, but he was to ſhew his Licenſe to the Incumbents before he was ſuffered to Preach.

In the Reign of *Hen.* 7. Preaching was in ſo great Reputation, that the Queen Mother imployed *Fiſher*, Biſhop of *Rocheſter*, to find out the moſt Eminent Preachers in thoſe days, that ſhe might maintain them at her own Charge, and tho' it was afterwards ſo much valued by *Eraſmus* and other great Men of that Age, yet there were very few Sermons Preached but in Lent.

The Fryars indeed made ſome Diſcourſes on Holidays, not to Inſtruct the People to lead Holy and Virtuous Lives, but to magnify that Saint to whom the day was Dedicated.

In Lent there was more ſerious Preaching, but it was not ſo ſerious as it ought; for it was chiefly to applaud the Laws of the Church concerning Abſtinence at that time, confeſſion of Sins, and ſome other corporal Severities.

(*e*) Prov. Conſtit. de Officio Archpresbyt. fo. 282.

The Reformers of thoſe Laws in the Reign of *Hen.*8.(*f*) called Preaching *Officium præclarum*, to which no Man ought to be admited *niſi pietatem & convenientem Doctrinam ſecum adferat*, and that none ſhould preſume to Preach without a lawful Call by thoſe who had power to Admit him to it, and not every one *qui Spiritu dei ſe jactat afflatum*, but the Biſhop ſhould have a due conſideration of the Life and Learning of thoſe who they admit to this Office, by which they might be ſatisfied that the Spirit proceeds from God.

I know 'tis objected againſt this power of the Biſhop, that *Medad* and *Edad* (*g*) propheſied amongſt the People without any Commiſſion from *Moſes*; (*h*) that *Apollos* taught in the Synagogue, tho' he was not ſet apart for the Miniſterial Function; and that St. *Paul* himſelf, tho' a great Preacher, yet he was but a Tent-maker.

In anſwer to the firſt of theſe Inſtances no Man can imagine that miraculous Prophecying hath any manner of reſemblance to our common and uſual Preaching, and as for the teaching of Apoſtles in the Synagogue, it was no more than a Solemn Deciſion of ſome controverted points in Divinity, which, in thoſe days was performed by the Laiety as well as the Clergy, and tho' St. *Paul* was a Tent-maker, yet he never Preached as ſuch, for when he Worked at his Trade, it was upon a particular occaſion to ſupply his common neceſſities, that he might not be a charge to the People, but he never Preached till inſpired by the Spirit of God, which none but Euthuſiaſts and ſome of our modern Prophets will pretend too.

'Tis likewiſe objected, That ſome of the Diſciples who had no Authority from our Saviour to Preach, yet when they were ſeparated from him, and diſperſed thro' the Nations of the Earth, they are ſaid in (*i*) Scripture *to go forth every where Preaching the Word*, but it was in unſettled times, when any Man was allowed to Preach the Goſpel, that it might the ſooner be propagated amongſt the People.

But when once the Church was Eſtabliſhed, then the Clergy were ſoon diſtinguiſhed from the Laity, for our Saviour himſelf appointed ſome to be Apoſtles, ſome to be Evangeliſts, (*k*) and ſome to be Paſtors and Teachers; he gave them likewiſe an account of their Miſſion, by telling them, as his *Father ſent him, ſo he ſent them.*

Then after his Crucifixion, the Apoſtles placed Biſhops and Elders, and Deacons, in the Church, and this was *for the perfecting the Saints.*

(*f*) Reform. Legu. Eccleſiaſt. 34. (*g*) 11 Numb. 26. (*h*) 18 Acts 24.
(*i*) 8 Acts 4. 11, 7, 19. (*k*) 4 Eph. 11.

Now,

Now, if thoſe who were not lawfully ſet a-part for the Miniſtry, might ſupply that Holy Function, there had been no occaſion of ſo much care in the Original Settlement of the Chriſtian Church.

Beſides, 'tis not a Work very eaſie to make Reconciliation betwixt God and Sinners, it requires ſome Application to Learning and Study in Divinity, in order to a right underſtanding the Scriptures, and we ſhould have but very few puſt up with an imaginary blaſt of the Spirit, or ſtart into a Pulpit from a Shop, if ſuch Men would take St. *Baſil* and St. *Gregory* for a Pattern, who, as *Ruffinus* tells us ſpent 13 Years in ſtudying the Scriptures, and ſearching after the Senſe thereof, before they entred upon the Miniſtry; and I do not believe that the Spirit of God exerts it ſelf in a more peculiar manner in them who now pretend to it, then it did in thoſe Holy Men of old, but rather an opinionative Spirit of their own, and ſuch are called by the Prophet *Ezekiel* (*l*) fooliſh Prophets, and not only ſo, but a woe is Denounced upon them.

But from this Digreſſion, about the beginning of the Reformation great care was taken to ſend Eminent Preachers throughout the Kingdom, and theſe were not confined to particular places, but had the King's Licenſe to Preach any where.

But the Sermons of ſome of thoſe Preachers were no more than Invectives againſt the Fryars, and ſome other Perſons, who did faintly conform to the Changes then made, had ſtill ſome of the old Leven in them; ſo that the Government did not think it ſafe to leave the progreſs of the Reformation to ſuch blind and ignorant Guides, therefore two Books of Homiles were Compoſed, one of them was Publiſhed in the Reign of *Edw.* 6. and the other ſoon after his Death, which being only ſhort and Practical Diſcourſes upon ſome places of Scripture, were enjoyned to be Read in the Churches, in order to oblige both the Miniſters to Teach, and the People to be Inſtructed according to the form of a Godly and ſound Doctrine.

But Incumbents legally poſſeſſed of any Eccleſiaſtical Living, might Preach in their own Pariſhes without the King's Licenſe; and the Homilies were often laid aſide for the ſake of Preaching, by thoſe to whom the Biſhops gave Licenſes ſo to do, and thoſe Preachers thus Licenſed, contradicting the Opinions of others in relation to the great change then made in Religion, that good King *Edw.* 6. iſſued forth a Proclamation, prohibiting the Biſhops to grant any more Licenſes to

(*l*) 13 Ezek. 3.

Preach, and that none ſhould be obtained but of him and the Archbiſhop of *Canterbury*.

This muſt certainly have leſſened the number of Preachers, but it ſeems thoſe very Perſons who got Licenſes from the King and Archbiſhop did not make good uſe of their Liberty, for that King by another Proclamation inhibited Preaching in general throughout the Kingdom, to the intent the Clergy might apply themſelves to Prayer, in order to implore a Bleſſing upon what was then in Agitation, which was an uniform Order of Common Prayer, and that they ſhould Read the Homilies in the mean time.

About two Years after this Proclamation ſome of the Clergy began to Preach again, but it was on Week Days, and theſe were called Lecturers, which being a new and unuſual performance many People came to ſee and hear them from neighbouring places, and this begat an Emulation amongſt the Clergy which of them could draw moſt People to be their Auditors.

The Learned Biſhop of *Sarum* tells us, that as to this Matter there have been Exceſſes on both ſides, for ſome with great ſincerity have kept up thoſe Lectures in Market Towns, and others have continued them with faction and with a deſign to detract from thoſe Godly Miniſters who were not very Eminent in Preaching, and this gave a prejudice to ſome Perſons in Authority, who endeavoured to ſuppreſs all performances of this nature; and the Preachers being by this means poſſeſſed with an Opinion that this would be a hindrance to Piety, have endeavoured to keep up a Zeal in the minds of the People for Lectures, which (he tells us) ſince they have been freely Preached, have not produced thoſe ill Effects which followed many Years ſince, when means was uſed to ſuppreſs them.

But to proceed in the firſt Year of Queen *Mary's* Reign, Preaching was again prohibited without her leave, and this happened by the indiſcretion of one *Bourne*, who was Biſhop *Bonner's* Chaplain, who, Preaching at St. *Paul's*, reflected ſeverely on the proceedings in King *Edward's* Reign, inſomuch, that his Hearers were ſo inſenſed at his Sermon, that one of them threw a Dagger at him with very great force, but the Parſon ſaved himſelf by ſtooping, and the Dagger ſtuck faſt in the Pulpit.

This prohibition of that Queen was an effectual means to reſtore Popery; for it muſt be difficult in her Reign for any of the reformed Religion to get Licenſes to Preach, which were freely offered to thoſe of the contrary Opinion.

Thus

Thus *Gardener* Biſhop of *Winton* licenſed ſeveral to Preach in any Cathedral or Pariſh Church, and this moſt of the Clergy ſubmitted unto, yet ſome had the courage to Preach publickly notwithſtanding the Queen's Prohibition, but they were committed to Priſon and proſecuted as diſaffected Perſons to her and to her Government, and thus it ſtood during her Reign.

But all this while we have no account of any Preaching by Biſhops, for that was almoſt diſuſed, inſomuch, that in *Queen Elizabeth*'s Reign when *Pius Quintus* preached a Sermon, it was looked on as one of the Wonders of that Age.

In the beginning of that Queen's Reign there was ſo great a ſcarcity of Miniſters who would comply to the Reformation, that ſhe licenſed *Lay-men* to Preach publickly, and we have an account of an High Sheriff of *Oxfordſhire*, who in the firſt year of her Reign preached the Aſſize Sermon in the Univerſity there, but 'tis probable he did not perform it *abſque cujuſlibet ſubtilitatis textura fantaſtica*, for ſo Preaching was called in *Ed. 6.* time, tho' 'tis very remarkable that a *Layman* ſhould Preach in an Univerſity where ſo many of the Clergy are educated.

For the moſt part of that Queen's Reign one Preacher ſupplyed ſeveral Cures, for the greateſt part of the Parochial Clergy being unable to Preach themſelves, where obliged to hire thoſe who were able to perform this Duty, and for the greater encouragement of preaching Miniſters, it was enacted in the (*a*) 13th Year of her Reign, that none *ſhould be admitted to a Benefice with Cure, &c. of above* 30 l. *yearly vallue in the Queen's Books, but a Batchelour of Divinity or a Preacher lawfully allowed by ſome Biſhop or by one of the Univerſities.*

Afterwards a Canon was (*b*) made to enjoin them to Preach one Sermon every Sunday in the Year, either in their own Pariſhes or in ſome other Church or Chapel where there was no Preacher.

But yet theſe beneficed Clergy muſt have an allowance to be Preachers, for if they were not *Licenſed* then another Canon requires them to procure one who was, and he was to Preach once in a Month in the Pariſh Church, and on other Sundays to read the Homilies.

And no Strangers were admitted to Preach without producing a Licenſe (*c*) for that purpoſe, and that the Biſhop might have an account of them who tranſgreſſed in this mat-

(*a*) 13 Eliz. cap. 12. (*b*) Canon 45. (*c*) Can. 50.

ter, the Churchwardens were enjoined to keep a Book (*d*) wherein the Perſon ſo preaching was to ſubſcribe his name and the day when he preached, and the name alſo of that Biſhop who gave him Licenſe to Preach.

And no Perſon was to oppoſe the Doctrine (*e*) in one Church which was delivered in another without firſt acquainting the Biſhop with it, and receiving Orders from him what to do.

Theſe are the Canons which were made in King *James* his Reign, and which relate to preaching, and they were made at a time when many excellent Preachers lived, and particularly Mr. *Perkins* and *Reynolds*, and others who gave the people ſuch a taſt of Religion and Peity by their frequent and elaborate Sermons that they kept it always warm in their Minds, and this was carried on with very great Diligence in all that Reign by very learned and eloquent Preachers, and continued in the Reign of his Son and Succeſſor till the Civil Wars broke in upon the peace of the Church, and then every body preached beſides Schollars.

As ſoon as Peace was reſtored to the Nation, the Church was ſoon furniſhed with eminent Preachers, and no Age ever produced a more learned Clergy then at this time, who by their Preaching and Writing may convince the People that they ſet a vallue on true Religion, and who by their Example and Doctrine have endeavoured to reclaim the looſe and vitious part of Mankind, and are not only become the Honor of their Function, but have given all unprejudiced Perſons a ſufficient Demonſtration that they have a far greater regard for their Flocks than their Fleeces.

None of theſe Miniſters came in by purchaſing Licenſes to Preach, which was done formerly, and therefore the Statute was made which provides (*f*) *That if any perſon takes a reward to give a Licenſe to a Clergy-man to preach more than the juſt Fee, the perſon taking it forfeits* 40 l. *and the Miniſter ſo Licenſed forfeits* 10 l. *and is to looſe ſuch Living as he ſhall obtain ſeven years after ſuch Licenſe, and the Patron may preſent as if the Clerk was actually dead.*

And that they may quietly perform their Duty, the Law (*g*) hath taken care that Preachers ſhall not be diſturbed in the Church, which if any one ſhall attempt to do, the Conſtable or Churchwardens of the Pariſh may bring the Offender before a Juſtice of the Peace, who ſhall commit him to ſafe Cuſtody, but not to the Common Goal, then the Juſtice

(*d*) Canon 52. (*e*) Can. 53. (*f*) 31 Eliz. cap. 6. (*g*) 1 Mariæ cap. 3.

who

who committed him, together with another Juſtice of the Peace, is within ſix days afterwards to examine the Fact, and if they find cauſe they may commit him to Goal for three Months, and from thence to the next Quarter Seſſions, at which, upon his reconciliation and giving Bond to be of the good Behavour for a Year he ſhall be releaſed, but if he perſiſt in his Obſtinacy he ſhall be committed without Bail till he Repents.

And by a late Statute 'tis 20 *l.* penalty to diſturb a Preacher, as well in a Conventicle as in a Church, but this muſt be upon a conviction in Seſſions, and in order thereunto the Offender muſt give a Bond of 50 *l.* with Sureties for his Appearance there, if he refuſe he muſt be committed till the next Seſſions, the proof muſt be by two Witneſſes upon Oath before one Juſtice of the Peace.

Prebend and Prebendary.

THIS is a Member of a Cathedral Church, and ſome are of Opinion that he is called a Prebendary *a prabendo auxilium Epiſcopo*, but I rather think 'tis from that portion which the Church yields to him out of her Stock for his Maintenance, which is called *prabenda*, and is a diſtinct Benefice ariſing from ſome Lands or Church, and appropriated for the ſupport of a *Prebendary*.

I grant that my Lord *Coke* (*h*) tells us, there might be a Chapter before they had any Poſſeſſions, from which it may be inferred, that there might be a *Prebendary* before he had any peculiar Maintenance, but whether he was diſtinguiſhed by that name before he had any *Prebend* it doth not appear.

'Tis true, all the Revenue of the Church was formerly in the Biſhop, and afterwards he granted certain Portions to the Dignitaries, and for this reaſon he is of common right the Patron of moſt *Prebendaries*.

Some indeed are *Donative* (*i*) as at *Weſtminſter* the Queen collates by Patent, and by vertue thereof the *Prebendary* takes Poſſeſſion without Inſtitution or Induction.

Some are in the gift of Lay-men, but in ſuch caſe they muſt preſent the *Prebendary* to the Biſhop, and the Dean and Chapter inducts him, and places him in a Stall in the Cathedral Church, and then he is ſaid to have *locum in choro*.

Theſe Prebendaries are likewiſe diſtinguiſhed into thoſe which are called Simple and Dignitory.

(*h*) 2 Inſt. 75. b. (*i*) 2 Roll. Abr. 356.

A *ſimple Prebendary* is ſuch who hath no Cure, and who hath no more but this Revenue for his Support.

A *Prebendary with Dignity* hath always a Juriſdiction annexed, and for this reaſon he is called a Dignitory, and his Juriſdiction is by Preſcription, as for inſtance, a *Prebendary* preſcribed for himſelf and his Farmers to grant the Office of a Commiſſary, that he made a Leaſe of the *Prebend* for three Lives, and that the Leſſee granted this Office with *all Profits, Commodities and Advantages*, &c. to the Plaintiff, that the Defendant claiming a Right under the Dean and Chapter libelled for it in the Arches.

The Court was divided upon the point in Law, (*k*) whether any Eccleſiaſtical Juriſdiction paſſed by this Leaſe to the Leſſee, ſo that he might make a Commiſſary to keep Courts, *&c.* the objection was, that it was a Power or Truſt annexed to the Perſon of the *Prebendary* as he was a Spiritual Member, and therefore it could not paſs to his Leſſee, eſpecially if a Lay-man, for a Commiſſary was no more then a Deputy, which the Leſſee could not depute.

But it was anſwered, that tho' the Prebendary was a Spiritual Perſon, yet his Juriſdiction was Temporal, and therefore might paſs by thoſe general words in the Leaſe, eſpecially if it had uſually paſſed ſo before, but I rather think that an Office of Juriſdiction will not paſs by general words, as a *Recorder* cannot make a *Deputy* without a Special Grant or Cuſtom to warrant it.

Theſe *Prebendaries* make the *Chapter*, of which the Dean is Chief, and therefore when a *Prebendary* dies the Profits are in the *Dean and Chapter* till another is collated, and if afterwards he accepts a *Deanry* (*l*) his Prebend is void by *Ceſſion*; ſo if he is made a Biſhop the Queen preſents to his Prebend.

But the acceptance of a *Deanry* muſt be underſtood to be in the ſame Church, therefore *Anno* 11 *Ed.* 3. (*m*) the Biſhop of *Durham* having preſented a Clerk to a *Prebend* of the Church of St. *Andrew*, and afterwards preſented the ſame Perſon to a *Deanry* in that Church, it was held that the King ſhould recover the Preſentation to this Prebend; becauſe one and the ſame Perſon cannot poſſeſs two *Prebends* in one and the ſame Church, which is very true, but the reaſon was not applicable to the caſe, *viz.* that a *Prebend* is void by the acceptance of a *Deanry* in the ſame Church, which is likewiſe true, but then it muſt be underſtood of a *Prebendary* who is a compleat Member of the Chapter, that is one who hath *locum in*

(*k*) Raim. 88. 1 Lev. 125 H. 6 Roll. Abr. 361.

(*l*) 2 Roll. Abr. 843.

(*m*) 11 Ed. 3. B. R. Rot. chor?

choro & ſuffragium in capitulo for an *Archdeacon* may be either a *Dean* or *Prebend* of that Church where he is *Archdeacon*, becauſe *quatenus* ſuch he hath no Vote in the Chapter.

Before the Statute 14 *Car.* 2. *a Lay-man* (*n*) might be preſented to a *Prebend*, becauſe 'tis a Benefice without Cure, *&c.* and for that reaſon a *Prebendary* (*o*) and a Parochial Benefice are not incompatible Promotions, for one Man may have both without any Avoidance of the firſt.

This is proved by common Experience, beſides the (*p*) Canon which enjoins *Prebendaries* not to abſent themſelves *from their Benefices* with Cure for above one Month in a Year, and that they ſhould, amongſt themſelves, proportion the times of their Reſidence in the Cathedrals, ſo that ſome of them might be always Reſident there, and after the time appointed by their local Statutes is expired, they are required to go to their Benefices, or one of them to diſcharge their Duties, and this the Biſhop is to ſee duly performed.

And that *Lay-men* were promoted to *Prebends*, we have ſeveral inſtances, as *Anno* 2 *Ed.* 6. the Earl of *Hertford* had the promiſe of ſix, the Lord *Cromwell* was made *Dean of Wells*, and ſuch Eccleſiaſtical Benefices were conferred on more Laymen before that Statute, but none ſince, for now ſuch Perſons only who are *Ordained by Epiſcopal Ordination* are made capable of all Eccleſiaſtical Promotions.

And becauſe a Prebend it ſelf is not a Benefice with Cure, *&c.* therefore a Prebendary is not oblidged to read the 39 Articles, but he muſt ſubſcribe the Declaration, for that is required by the aforeſaid Statute, *viz.* as he is a Perſon in Holy Orders and taking an Eccleſiaſtical Dignity upon him.

But by the Canon he is obliged to Preach in his (*q*) Cathedral as often as he is bound by any Law, Cuſtom, or Ordinanee, and not only there but in the Pariſh Churches of the Dioceſs where he is Reſident, eſpecially in ſuch Churches from whence the Cathedral receives any Rents, and if he cannot Preach himſelf by reaſon of Sickneſs, he is to ſubſtitute one in his place, and if he neglects to ſupply his courſe he may be puniſhed by the Biſhop.

Laſtly, Tho' Prebendaries as ſuch have no cure of Souls, yet we are told that there is a Sacred Charge (*r*) incumbent upon them in thoſe Cathedrals where they reſide, and that a Prebend is a juſt and neceſſary encouragement either for ſuch

(*n*) 14 Car. 2. (*o*) Cro. Eliz. 79. (*p*) Can. 44. (*q*) Can. 43. (*r*) B. H. R. 3 Pt. 8.

who

who by Age or other Defects are not fit for a Parochial Cure, and yet may be capable to do eminent Service in the Church.

It may be difficult for ſome Perſons to apprehend what that Sacred Charge is, and what eminent Service a Man can do to the Church who hath ſo many defects that he is not capable of a Parochial Cure.

I admit that it may be a reaſonable ſupport to ſuch Perſons who by their conſtant and diligent Labour in their Pariſhes, have merited ſuch a preferment, eſpecially if their Maintenance is ſo ſmall as to ſtand in need of farther ſubſiſtence, and that it ſhould not be employed to enrich any ſenſual Perſons.

Preſcription.

THIS refers to a certain Perſon, Houſe, or Land, and is always Perſonal, that is, 'tis made in the name of a ſingle Perſon and his Predeceſſors, and all thoſe whoſe Eſtate he hath, *&c.* and in this reſpect it differs from a Cuſtom which is more general, and therefore is never alledged in any ſingle Perſon for 'tis always local, and extends to many Perſons, *viz.* to all the Inhabitants of a County, City, Town, Hundred, *&c.*

The Reformers of the Eccleſiaſtical Law (*a*) have defined *Preſcription* to be a *Right* eſtabliſhed by time, co-operating with the Law, cauſing the negligent to forfeit it, aud putting an end to Suits.

This agrees with the Diſcription which *Bracton* made of it long before, who tells us that where a thing hath been received and approved by long uſe it obtains the force of a Law, that a right may be transferred by a long and peaceable Poſſeſſion without any other Title, becauſe all Claims ought to be limited to a certain time, otherwiſe there would be no end of Contentions.

The learned *Biſhop of Worceſter* hath with his uſual Sagacity explained this matter, *viz.* that *non claime* conſidered abſtractly from all other Circumſtances cannot give any Right, becauſe it may be occaſioned either by ignorance or fear, that a right cannot be loſt by the negligence of the Perſon concerned, unleſs there is an antecedent Law to make that neglect a Forfeiture, but that 'tis the common intereſt of Mankind there ſhould be ſome fixed Bounds to all claims of Right, for otherwiſe Men would live in a State of War and Confu-

(*a*) Reform. Leg. Eccleſ. fol. 246.

ſion

ſion, and therefore it hath been always accounted reaſonable in this Nation, and agreeable to our Laws, that a Right ſhould be acquired by long and *peaceable* Poſſeſſion, I ſay *peaceable*, becauſe there can be no Preſcription where there can be any legal proof made of an interruption.

But this muſt be intended (*b*) where there hath been any interruption of the *Right*, for a diſcontinuance for ten Years or longer is no bar to a Preſcription, 'tis only a Suſpenſion for a time.

Neither is it deſtroyed by any alteration (*c*) of the payment, as inſtead of Money which had been uſually paid, to have paid Tithes for 20 Years paſt, but if the Preſcription isto be diſcharged of Tithe-hey in ſuch a Ground, and the Owner converts it into Tillage, the Preſcription is gone, and ſo 'tis by any alteration which is made to the prejudice of the Parſon.

There are ſome Preſcriptions which are not allowed by the Canons of the Church, as for a Clergy-man to preſcribe againſt a Viſitation, or for non-payment of Procurations at that time, and ſome are not allowed by the common Law, as for a Lay-man to preſcribe *in non decimando*.

So to pay no Tithes nor any thing in lieu thereof, (*d*) tho' nothing can be proved to be paid in the Memory of Man, this is not good.

So to pay the Tithes of one thing in recompence for the Tithes of another, or to pay no Tithes for Cattel, becauſe he pays Tithe-Corn, or to pay none in one place, becauſe he pays them in another, or to pay no Tithes, becauſe he hath time out of mind repaired the Church, theſe Preſcriptions are not good.

So to pay ſo many Calves and Lambs, and a penny for every milch Cow in ſatisfaction of all Tithes of Calves and Lambs, and milch Kine, *and all Barren and other Beaſts and Agiſtments*; this laſt Clauſe makes all void.

But a Preſcription to pay leſs than a tenth part is good, and ſo 'tis to pay a certain ſum of Money for all his Tithes generally, or for his Tithe-Hey, or for his Tithe-Corn on ſuch a Farm.

So to pay a penny called an Hearth-penny (*e*) in ſatisfaction for the Tithes of Wood for his Fire, this is good.

The payment of a ſum of Money or any other thing in lieu of Tithes for ſix years is held a reaſonable time to make a Pre-

(*b*) 1 Inſt. 114, b. (*c*) 1 Inſt. 14. (*d*) 1 Roll. Abr. 649, 8, 651. Plito. 16. (*e*) Noor 910.

ſcription,

ſcription, which being a temporal thing, is to be tried in the Temporal Courts.

But this is not always ſo, for where the Preſcription is meerly Spiritual it ſhall be tried in the Eccleſiaſtical Courts; as for inſtance, if the Churchwardens of the Mother Church do tax the Inhabitants of a Chapelry of Eaſe to repair that Church and ſue for this Tax in the Spiritual Court, and the Defendants ſuggeſt that time out of mind they have repaired their own Chapel, and ſo ought to be diſcharged towards the repair of the other, all this matter is of Eccleſiaſtical Cognizance, and therefore it ſhall be tried in that Court.

Preſentation.

BEFORE I treat of a Preſentation, I think it may be proper to ſpeak ſome thing of the Patron, which word ſignifies him who hath the Right to preſent to a Benefice.

Dr. *Godolphin* tells us 'tis derived *a Patrocinando*, that is, from pleading the Cauſe, or defending the Rights of the Church, but withal as improperly as *Mons* is derived *a movendo*, for in this Age ſome Perſons, inſtead of defending, do proſtitute the Church and the Revenues thereof to Sale and Merchandize.

He who gave the Ground or who built the Church or endowed it, had a right to preſent a Clerk to that Church, but not without the conſent of the Biſhop, and this was called *jus Patronatus* by the Canon Law, which is an *Advowſon* by our Law.

But tho' the Biſhop at firſt was to fill the Churches with Incumbents, yet they afterwards transferred this Power to the Laiety to encourage them to build more Churches, but this was only a power of Nomination, and not an abſolute Power to diſpoſe the Benefice upon what terms they would, for the Biſhop was ſtill to ſee that the Clerk was qualified and then to admit him, and if the Patron did not nominate one in a limited time, then the care did return to the Biſhop again, and ſo it continues at this day.

But tho' the Patron had Power to nominate another, yet he cannot nominate himſelf, but he may pray the Ordinary to admit him, and an admiſſion upon ſuch a prayer is good.

As to the Preſentation it ſelf, 'tis the act of the Patron which doth not carry with it the formality of a Deed, but 'tis in the Nature of a Letter miſſive, by which the Clerk is offered to the Biſhop, and 'tis always directed to him, and uſually in this form if to the Archbiſhop, *Reverend*

*Reverendiſſimo in Chriſto patri & domino. Domino Chriſto permiſſione divina Cantuarenſi Archiepiſcopo * totius Angliæ primati & Metropolitano ejus ve in abſentia vicario in rebus Spiritualibus generali aut alicui in hac parte ſufficientem authoritatem habenti,* &c.

If 'tis to any other Biſhop, then the form is thus,

Reverendo in Chriſto patri & domino. Domino Joh'i divina permiſſione Ciceſtrenſi Epiſcopo ejus ve vicario in Spiritualibus generali J. A. *Armiger indubitatus Patronus Eccleſiæ Parochialis de* H. *in Com.* S. *ſalutem in domino ſempiternam, ad Eccl'iam de* H. *pred. veſtra dioceſeos modo per † mortem. Is ultimi Incumbentis ibidem jam vacantem & ad meam donationem pleno jure ſpectantem dilectum mihi in Chriſto* P. S. *clericum in artibus magiſtrum paternitati veſtræ præſento humillime ſupplicans quatenus præfat.* P. S. *ad dictum Eccl'iam admittere eumq; Rectorem ejuſdem Eccleſiæ inſtituere cum ſuis juribus & pertinentiis univerſis cæteraq; expediri & peragere quæ veſtro in hac parte incumbunt Officio paſtorali dignemini cum favore in cujus rei teſtimonium his præſentibus : Sigillum appoſui, Dat.* 18 *die Octobris Anno Regni,* &c.

This right of Preſentation is a Temporal thing, (z) and therefore it properly belongs to the Temporal Courts to determine who is the true Patron, and at what time, and when to be void.

'Tis a right which may be transferred to another by Deed or Will, it may be forfeited by Outlary, and then the Queen ſhall Preſent, which remains good, tho' the Outlary ſhould be afterwards reverſed, but this muſt be underſtood where the Advowſon was forfeited by the Outlary, and the Church became Void after that Forfeiture, for in ſuch Caſe the Preſentation is veſted in the Crown, as 'tis the profits of the Advowſon ; (a) but if the Church was actually Void at the time of the Outlary, then the the Preſentation is forfeited as a Chattel, and upon the Reverſal of the ſame, the Party ſhall be reſtored to it.

It may be forfeited likewiſe by Symony or Recuſancy, of which more hereafter; by the attainder of the Patron, by an appropriation without a Licenſe from the Queen; (b) but the Inheritance in this Caſe is not forfeited, only the Queen ſhall have the right of Preſentation in nature of a Diſtreſs, till the Delinquent hath paid a Fine for his Contempt.

It may be forfeited by an Alienation made in fee of the Advowſon it ſelf, by a Grantee for Life of the next Avoi-

* If to the Archbiſhop of *York, totius* muſt be left out. † *Reſignationem Ceſſionem Deprivationem*, as the Caſe is. (z) 2 Roll. Abr. 293. (a) Moor. 269. (b) Ploud. 499.

dance

dance; (c) for after ſuch an Alienation the Grantor may preſent, but then he muſt enter for a forfeiture in the life time of the Incumbent, (d) for if he neglects it till his death and then preſents, this is Void, becauſe the Eſtate of the Grantee for life was not determined till the Grantor had claimed it as forfeited, which being omitted, the Preſentation veſts in the Grantee as a Chattel upon the death of the Incumbent, and ſhall not be diveſted by the Preſentation of him in Reverſion:

And becauſe there are ſeveral Perſons who have a right of Preſentation, I ſhall treat of them diſtinctly, *viz.* Of Preſentations by *Common Perſons*, *Coparceners*, *Joyntenants*, and *Tenants in Common*; by *Corporations*, by *Baron* and *Feme*, by *Executors*, by *Infants*, by the *Queen*.

By a Common Perſon.] As to Preſentations by Common Perſons, 'tis agreed, that all who have ability to Purchaſe or Grant, have likewiſe an ability to preſent to Vacant Benefices, and this may be done by Perſons *Excommunicated or Outlawed*, but in ſuch Caſe the Biſhop may refuſe the Preſentee.

That the Preſentation muſt be within ſix Months after the Avoidance, and that a Clergy-man who is Patron cannot preſent himſelf, (e) but may either pray to be admitted by the Biſhop, or he may deviſe the next Preſentation to his Executors, and if by ſuch deviſe he appoints that they, or either of them ſhall preſent one of their own number, the Preſentation made by the reſt is good.

By Coparceners.] Coparceners are but as one Patron in the Law, and therefore they ought to agree in the Preſentation of one Perſon, if they cannot, the Eldeſt ſhall preſent alone, and the Biſhop is bound to admit her Clerk.

But if they ſhould ſeverally preſent ſeveral Clerks, the Biſhop is not obliged to award a *Jus Patronatus*, becauſe they preſent under one Title, and ſo not like the Caſe where two Patrons preſent by ſeveral Titles, but if the Eldeſt Siſter joyn with another Siſter, the Biſhop may ſuffer the Benefice to Lapſe, which he cannot do if ſhe preſents alone, and after ſhe hath preſented the next ſhall have her turn, and this privilege doth not only extend to the Iſſue of the Eldeſt, if ſhe ſhould die, (f) but likewiſe to her Husband, if he is (g) Tenant by the Curteſie.

If one Coparcener uſurps upon the turn of another, that ſhall not put her to her Writ of Right, but ſhe ſhall preſent upon the next Avoidance, becauſe an uſurpation amongſt Coparceners is only for that turn upon which the uſurpation was made.

(c) 2 Roll. Abr. 352. (d) Jones 391. 2 Roll. Abr. 352. Litt. Rep. 366.
(e) 3 Bulſt. 43. (f) Co. Litt. 116. b. (g) Co. Litt. 186. 2 Roll. Abr. 346.

Joyn-

Joyntenants and Tenenants in Common muſt joyn likewiſe in the Preſentation, for if either preſent alone, the Biſhop may refuſe his Clerk, (*h*) and ſo he may the Clerk preſented by the major part, and if the ſix Months expire before they agree, he may collate by Lapſe.

But if there is a grant of the next Avoidance to Four, naming them, *Et eorum cuilibet conjunctim & diviſim*, (*i*) in ſuch Caſe if one alone preſents 'tis good, and yet if there ſhould be ſuch a ſeverance in the *habendum* 'tis void, as if the grant is to Four *habendum eis conjunctim & diviſim*.

In *Windſor*'s Caſe there are ſome diſtinctions made, where Perſons have a (*k*) Right of Preſentation by turns, *viz.* It was in a *Quare Impedit* brought for the Church of *Buſcott* in *Berks*, the Plaintiff *Loveden* had two parts of the Advowſon, and the Defendant *Windſor* had one part, the Plaintiff preſented *Parry*, who was Inſtituted and Inducted, and afterwards deprived by *Queen Mary*, for being a Proteſtant, and *Loveden* ſuppoſing that his ſecond turn was not ſatisfied, becauſe of the Deprivation of *Parry*, he preſented one *Dacres*, who was likewiſe Inſtituted and Inducted, and the Defendant *Windſor* ſuppoſing that both the turns of the Plaintiff were ſatisfied, preſented one *Hitch*, who was alſo Inſtituted and Inducted.

Anno 1 *Eliz. Hitch* was deprived, and *Parry* reſtored, and the Church being Void afterwards by his Death, the Queſtion was, whether by the Inſtitution of *Parry*, tho' he was afterwards deprived, the Incumbency of *Dacres* ſhould be Void? for if ſo, then *Loveden* had no more than one turn, and it was adjudged that the Preſentation of *Dacres* ſhall not make one turn, becauſe the declaratory Sentence of reſtitution of *Parry* did abſolutely avoid his Deprivation, and he was Incumbent again upon his firſt Preſentation, which was recontinued by that Sentence, and when he died, being the laſt Preſentee of the Plaintiff, he ought to preſent again, and his Preſentation of *Dacres* during the life of *Parry* could not be in his turn, becauſe *Parry* himſelf died Incumbent.

It was likewiſe adjudged in that Caſe, that if the Clerk of one is Inſtituted and Inducted, and afterwards deprived for any cauſe whatſoever, that ſhall ſatify his turn, becauſe the Admiſſion and Inſtitution were only voidable, and not void till Sentence, but when 'tis void *ab initio* 'tis otherwiſe, as in Caſe of not Reading the 39 Articles.

(*h*) Co. Litt. 186. (*i*) Moor. 4. 1 And. 2. Bendl. 34. (*k*) 5 Rep. 101. Moor. 599.

If there are two Joyntenants of the next Avoidance, (*l*) one of them may preſent the other, but if he preſents a Stranger the Biſhop may refuſe him.

So if Three have a right to preſent, and Two of them preſent the third Perſon, (*m*) the Biſhop cannot refuſe him, becauſe he cannot preſent himſelf, but if one alone had preſented a third Perſon it had been wrong.

Corporation preſenting.] When a Corporation preſents, it muſt be under their Common Seal, and by the true name of their Corporation, (*n*) otherwiſe 'tis void.

I admit that there is a contrary Judgment, in the Caſe of the Dean and Chapter of *Norwich*, (*o*) who were Incorporated by the name of the Dean and Chapter of the Cathedral Church of the Holy Trinity of *Norwich*, *ex fundatione Regis Edwardi Sexti*, which words were omitted in a regrant to them by the ſame King, and yet the grant was held good, but it was by reaſon of the Statute of confirmation, made in the firſt Year of that King's Reign, (*p*) which recites that he made ſeveral Grants, *&c.* and for avoiding all controverſies which might happen concerning any of them for want of true naming any bodies Corporate, it was enacted, That ſuch Grants made or to be made during his life, ſhould be good, notwithſtanding the miſnaming, *&c.*

By Executors.] If a Man hath a grant of the next Preſentation, and he dies, the Church being full, the right to preſent goes to his Executor; the Law is the ſame if he dies, the Church being void, and without deviſing his right, for the void turn is a Chattel, and before 'tis actually veſted in the Executor, he may grant it over to another.

But in ſuch Caſe if the Teſtator in his life time preſents a Clerk, and dies before he is admitted, and afterwards the Executor preſents another, the Biſhop may receive either.

If the ſame Perſon is both Patron and Incumbent, and he dies, (*q*) tho' the Preſentation is thus ſevered from the Advowſon, and veſted in the Executor, yet the Heir ſhall preſent, becauſe where two Titles commence at the ſame inſtant, as in this Caſe, upon the death of the Incumbent, the Advowſon deſcends to the Heir, and tho' the Avoidance is veſted in the Executor, yet the eldeſt Title ſhall be preferred.

But where a Biſhop hath a Preſentation in right of his Biſhoprick, and dies, his Executor ſhall not have the void turn, but the Queen, becauſe the Temporalties are in Her Hands, and She hath a right to preſent upon an Avoidance, during

(*l*) 1 And. 2. Moor. Dyer 365. 1 Inſt. 186. (*m*) 2 Roll. Abr. 348.
(*n*) 1 Bulſt. 91. (*o*) 3 Rep. 73. (*p*) 1 Ed. 6. cap. 8. (*q*) 3 Lev. 47.

the

the Seisure, and also upon an Avoidance on the death of the Bishop.

Husband and Wife.] If a Feme Covert hath a right to present, she cannot do it without her Husband, for the Presentation must be in both their names, or he alone may present during the Coverture.

And so he may after her Death, if he is Tenant by the Courtesie, and if he happen to die after the Avoidance, and before the Church is full, (*a*) his Executors, and not the Heir at Law shall present, because it was vested in him as a Chattel, and therefore it shall go to his Executors.

Presentation by Infants. A Guardian in Socage cannot present to a Church, for by the Law he is not to meddle with any thing but for what he may account, (*b*) which he cannot do for a Presentation, because he is to take nothing for it.

But some are of opinion that he may present, (*c*) so long as the Heir is under the Age of 14 Years; but my Lord *Coke* (*d*) affirms it for Law, that the Heir shall present, let him be of what Age he will.

By the Queen.] If the Queen is seized of an Advowson, in the right of the Dutchy of *Lancaster*, and She presents a Clerk under the Great Seal, 'tis good, (*e*) notwithstanding the Dutchy Seal is wanting; for a Presentation passes no Interest as a Grant doth, 'tis no more than a recommendation of a Clerk to the Bishop.

'Tis true, She may present by Her Letters Patents, and by these words, *viz. Damus & concedimus*, for this amounts to a Warrant for the Bishop to admit the Clerk.

If a Rector is made a Bishop, the Queen shall present by vittue of Her Prerogative, (*f*) unless She granted a Dispensation to him to hold his Rectory with the Bishoprick, and this must be before his Consecration.

If a Bishop is Patron of a Benefice which is void, and he dies before he presents, (*g*) the Queen shall have the Presentation.

So where a Deanry becomes void, whilst the Temporalties of an Archbishop are in Her hands, She shall present the new Dean.

If She presents without any manner of Right, and the Presentation is in this form, *viz. ad nostram Præsentationem sive ex pleno jure sive per lapsum temporis, &c.* (*h*) this will not amount

(*a*) 1 Inst. 29. *a.* 38 Edw. 3. 36. Bro. presentment al' Eglise 18. 21 H. 6. 56. 28 H. 6. 8. (*b*) 1 Inst. 17. *b.* 29. *a.* (*c*) 2 Cro. 99. (*d*) 3 Inst. 156. (*e*) Moor. 874. (*f*) 2 Roll. Abr. 343, 344. (*g*) 2 Roll. Abr. 343. (*h*) Yel. 7. Cro. Car. 592. Hob. 5. 302. Vaguh. 14. 1 Mod. 254.

to an uſurpation, becauſe it expreſſeth a Right where there is none, but if the Preſentation had been general 'tis otherwiſe.

But if She hath a real Title, and doth vary from it, (*i*) as where She hath a Title by Lapſe, and She preſents *pleno jure*, 'tis void, and all that follows upon it, becauſe 'tis built upon a wrong Foundation.

Laſtly, The Lord Chancellor hath the privelege to preſent to Her Benefices, under the yearly value of 20 *l.* in the firſt Fruits-Office.

Preſentation by a Recuſant. A Popiſh Recuſant Convict, cannot preſent during the time of his Recuſancy, but the Chancellor and Scholars of *Oxford* and *Cambridge* may do it, (*k*) in the reſpective Counties mentioned in the Statute: But this Act was evaded, by granting the Advowſon for a term of Years to a Friend in Truſt; but the Queen by virtue of the Statute might ſeize two parts in three of the Offenders Eſtate, and if She ſeized the Advowſon as part of the two parts, 'tis then veſted in Her, and the Univerſity ſhall not preſent to any Avoidance that ſhall happen during the Recuſancy, becauſe the Univerſity hath no real Eſtate in the Advowſon, (*l*) they have only a Right to preſent as the Biſhop hath, upon a Lapſe, and tho' the words of the Statute are, that a Recuſant ſhall be diſabled to grant any Avoidance to a Benefice, yet the grant of an Advowſon for Years is not comprehended under thoſe words, becauſe ſuch a Grantee may accept a Releaſe from the Patron.

By a late Statute 'tis Enacted, (*m*) That *if any Perſon ſhall refuſe or neglect to repeat and ſubſcribe the Declaration when it ſhall be tendered by two Juſtices of the Peace, or ſhall refuſe to appear before them for that purpoſe upon Notice given, he ſhall have his Name and place of Abode certified at the next Quarter Seſſions, and Recorded by the Clerk of the Peace, and ſhall from that time be diſabled to preſent or to grant the next Avoidance, as if he had been a Popiſh Recuſant convict, and that the Univerſities ſhall have the Preſentation, and all Perſons who ſhall be ſeized of an Advowſon or of any right of Preſentation in truſt for any Papiſt, or any one diſabled by this Act, ſhall be diſabled likewiſe to preſent, and if ſuch Truſtees do not give notice to the Chancellor of the Univerſity, within three Months after the Avoidance, they forfeit* 500 *l. to the Univerſity.*

Where a Plea of Recuſancy is Pleaded, the Defendant muſt ſet forth ſo much of the Act of 23 *Eliz. cap.* 1. which gives

(*i*) 2 Cro. 252. 6 Rep. 29. (*k*) 3 Jac. cap. 5. (*l*) Jones 17. (*m*) 1 W. c. 26. the

the Juſtices power to determine in their Seſſions all Offences for not coming to Church, and likewiſe ſo much of the Act of 29 *Eliz. cap.* 6. which recites, That upon an Indictment found againſt a Recuſant, Proclamation ſhall be made, that he render himſelf to the Sheriff before the next Aſſizes, which if he neglects, it ſhall be a ſufficient Conviction: And by the Statute of 3 *Jac.* aforeſaid, by which a Popiſh Recuſant Convict is diſabled to preſent to a Benefice, he muſt likewiſe plead the Record of Conviction, with an *hic in Curia prolat.* and he muſt not ſet forth that the Plaintiff did not render himſelf at the next Aſſizes, (*n*) for he might do it before; but a Pardon takes away this diſability.

Revocation of a Preſentation.

It hath been a Queſtion whether a Preſentation may be expreſly and actually revoked? or whether it ought be done *cumulando*, that is, by making a ſecond Preſentation, which is in Law a Revocation of the firſt.

'Tis agreed, that the Queen may actually revoke Her Preſentation; ſo in the Year Book 44 *Edw.* 3. *fo.* 35.

'Tis true, She may likewiſe do it *cumulando*, as where She hath a right to preſent, She firſt grants it to one and then another, (*o*) which is in Law a Revocation of the firſt, without mentioning it, and this She may do after Inſtitution of the firſt Preſentee, becauſe the Church is not full againſt Her till Induction:

But if either She or Her Preſentee ſhould die after Inſtitution, and before Induction, in either of theſe Caſes the death of the Party is a Revocation in Law of the Preſentation; (*p*) but 'tis otherwiſe where a Lay Patron preſents, and dies before his Clerk is admitted, for that is no Revocation of his Preſentation.

Now, when the Queen actually revokes Her Preſentation, if the Perſon ſhould afterwards get Inſtitution and Induction, without notice given to the Biſhop of the Revocation, 'tis abſolutely void, (*q*) for the Revocation is effectual before notice, that being only to make the Ordinary chargeable as a Diſturber, if he ſhould proceed to give Inſtitution afterwards.

The reaſon why the death of the Queen before Her Clerk is admitted ſhall be a Revocation in Law of Her Preſentation is, becauſe She had no effect of it. The ſame reaſon will hold in the Caſe of a common Perſon, but yet if he dies before his Clerk is Inſtituted, 'tis no Revocation, (as hath been before obſerved) becauſe the Preſentation is actually gon

(*n*) 3 Lev. 332. 2 Lut. 1100, 1117. (*o*) 1 And. 38. 2 Roll. Abr. 354.
(*p*) Dyer 348. 2 Roll. Abr. 354. (*q*) 2 Roll. Abr. 351. Plito 17.

from him, and ſo it was from the *Queen*, ſo that this ſeems to be an extraordinary Reaſon.

The next queſtion is, whether a Common Perſon can actually revoke a Preſentation? or whether he ſhould not vary *cumulando*? ſo that having preſented two Clerks the Ordinary may admit which he will.

My Lord *Rolls* tells us he cannot actually Revoke, and cites a Caſe in *Dyer* (r) to prove it, which muſt be a Miſtake, for there is nothing relating to this Matter, but the opinions of *Dyer* and *Mounſon*, that a Common Perſon cannot revoke his Preſentation after Inſtitution and before Induction, which is very true, becauſe upon the very Inſtitution the Church is full as to him.

But certainly he may do it before his Clerk is admitted, (ſ) becauſe a Preſentation is no more than a Recommendation of a Perſon to the Ordinary, in order to be admitted to a Benefice, and carries no Intereſt with, it as hath been mentioned before.

Procurations.

SINCE Biſhops, by the Common Law, are to viſit their Dioceſſes, in order to inquire into the Manners and Behaviour of the Clergy, both in reſpect to their Duties, as they are Miniſters, and what care they take to keep the Churches and Parſonage-Houſes in Repair, therefore the ſame Law hath provided that it ſhould be done at the Charge of thoſe Inferior Clergy who are Viſited, which is by a certain Tribute called *Procurations*.

This is defined by the Canoniſts to be *exhibitio ſumptuum neceſſariorum facta Prælatis qui dioceſos peragrando Eccleſias ſubjectas viſitant*, and it was to be provided ſuitable to the quality of the Viſitors, but with great Moderation and Temperance *ne jejuniorum doctrinam rubentibus buccis prædicent*, and from procuring theſe Entertainments for them and their Attendants, they were called Procurations, and the Canons were ſo ſtrict in this matter, that Money was forbidden to be given in lieu of Victuals, *ſub pœna maledictionis terraneæ*, and the Viſitor who received any Money, if he was a Biſhop, or above that Degree, he was to reſtore to the Church twice as much as he took from it, and that within a Month after he received it, but if he refuſed he was liable to an Interdiction *ab ingreſſu Eccleſiæ*.

(r) Dyer 348. (ſ) Latch. 254.

If

If under the degree of a Biſhop, he was to be ſuſpended *ab Officio & Beneficio.*

But the Biſhop in thoſe days being uſually attended with great Equipages at the time of their Viſitations occaſioned great Complaints amongſt the Clergy, * for as the Canon takes notice, they were obliged to ſell the Church Plate to buy Proviſion for them and their Attendants, and that *longi temporis victum brevis hora conſumebat,* therefore by that Canon their Retinue was limited to a certain number, *viz.* if an Archbiſhop was the Viſitor he was not to come with above Fifty, if a Biſhop, not to exceed Thirty, a Cardinal Twenty five, and an Archdeacon ſeven.

If the number of the Diſhes had been limited as well as their Retinue, it might have been ſome eaſe to the Clergy, but the Viſitors frequently *Sumptuoſas Epulas quærebant,* tho' they were directed only to take a competency, and that *cum gratiarum actione,* and twenty or thirty Horſe being a great Charge to the poor Clergy, (for they might ſtay a Day and a Night) therefore to remedy this inconvenience, Pope *Boniface* the 8th *Anno* 1295, made a Conſtitution, that *Volentibus viſitatis & non aliter,* the Viſitor might receive Money inſtead of Procurations.

But ſtill the Clergy were oppreſſed by the exorbitant demands of the Viſitors, for tho' this Canon made it lawful for them to compound for Money inſtead of Victuals, yet the ſum was not limited.

Therefore about ſixteen Years afterwards a Complaint was made of this matter in the Council of *Vienna* under Pope *Clement* the 5th, but it was not redreſſed till twenty ſix Years afterwards, *viz.* by a Decree made by *Benedict* the 12th, the ſum was proportioned according to the quality of the Viſitors and the Circumſtances of the Perſons viſited, but ſtill leaving them at liberty to pay ſo much in Money or in Victuals.

So that it muſt be a miſtake of Sir *Simon Degg* (*a*) to affirm that the payment of Money was begun by compoſition between the Viſitors and the Clergy, by which every one was to pay ſuch a proportion to them to be diſcharged of this great Oppreſſion, for it was certainly begun by thoſe Canons, and the *quantum* was ſettled by *Benedict* the 12th, but becauſe the Perſons viſited had ſtill power either to pay the Money or procure the Victuals, 'tis probable the Viſitors afterwards compounded with them for Money.

* Concil. Later. Sub. Alex. 3 Anno 1179. Can. 25. (*a*) Fol. 201.

And this voluntary payment being continued in many places, did in time grow into a Cuſtom by which the *quantum* is now ſettled and paid at this day.

That Procurations are due *ratione Viſitationis* is without all queſtion, but there hath been ſome doubt whether they are due for that alone, the reaſon which is uſually given for it is, that Procurations being only an exhibition to the Viſitor for his travelling Charges, when he ceaſes to Viſit nothing is due, and that when religious Perſons were dereigned, they were not ſubject to any Viſitation, and by conſequence no Procuration was due.

If this is true, then *Archdeacons* can have no right to demand Procurations in that Year wherein the Biſhop Viſits, ſo that *Ceſſante cauſa ceſſat effectus.*

But this doth not hold in Procurations the payment whereof may be reſembled to the caſe of Lands held by the payment of a Rent *pro warda Caſtri*, tho' the Caſtle is demoliſhed or decayed, yet the Rent muſt be paid.

In like manner, tho' Parſonages impropriate are now made Lay-Fees, and are in the hands of Perſons not viſitable, yet the Money which hath been anciently paid by Compoſition between the Viſitors and the Clergy ought ſtill to be paid.

This payment is now become a certain and ſettled Revenue of the Archdeacon, and 'tis in effect his Subſiſtence, 'tis valued to him in the Queen's Books, for which he pays Tenths, and in ſeveral Grants from the Crown of impropriate Rectories theſe Procurations are ſtill left as a charge upon the Impropriator.

I agree that ſome Canons have been formerly made in this Kingdom prohibiting Procurations to be paid to *Archdeacons* if they did not perſonally Viſit, and that they ſhould not preſume to take any Fees for not Viſiting.

But Cuſtom hath obtained againſt thoſe Canons, for 'tis not reaſonable that an *Archdeacon* ſhould be deprived of this Profit for his ſubmitting to the Biſhop in his triennial Viſitation, this would be to puniſh him for his Obedience to the Inhibition of his Dioceſan.

Therefore theſe Fees having been for a long time enjoyed and paid by the general conſent of the People to the Archdeacons themſelves when they do not viſit in Perſon are juſtly due to them, and at ſuch times they uſually make inquiry into the Circumſtances of each Pariſh either by themſelves or by their Officials, and this is done at two Chapters held about *Eaſter* and *Michaelmas*, and 'tis called a Viſitation, for which theſe Fees are due to them as well when they do not perſonally viſit as when they do.

The

The next thing I ſhall mention is where theſe *Procurations* are to be recovered, and as to that matter it would be neceſſary to conſider how the Law ſtood before the Act of 34 *H.* 8. *cap.* 19. and what alteration was made by that Statute.

And firſt, it ſeems very plain that before the making that Act, Procurations were recoverable in the Spiritual Court and not elſewhere, unleſs where the Plaintiff claimed them by Preſcription, and then it was triable at Common Law, tho' ſince it hath been doubted whether a (*b*) Bill in the Exchequer might not be proper in ſuch caſe; but that muſt be intended where they have not been paid within time of Memory, and this is by vertue of the *ſaving* in the Statute of 31 *H.* 8. *cap.* 13. by which the Monaſteries are given to the Crown, and the Lands belonging to them were ordered to be under the Government of the Court of Augmentations, *Saving to all Perſons and their Heirs ſuch Right, &c. Proxies, and other Profits which they or any of them may have or might or may claim as if that Act had not been made.*

So that if an Eccleſiaſtical Perſon hath a Right to receive Procurations tho' they have not been paid ſince the making that Statute, yet his Right is ſaved and he may recover it by a Bill in the Exchequer; but where Procurations have been paid ſince the Statute, it will be preſumed that they were paid before and at the time it was made, by which 'tis enacted, *That Procurations which were due and had been formerly paid by religious Houſes then diſſolved, ſhould ſtill be paid by the Occupiers of the ſame Lands to ſuch Eccleſiaſtical Perſons who were ſeiſed thereof within ten Years before the Diſſolution, and if upon Suits in the Spiritual Court for the ſame, the Defendants ſhall be convicted, they were to anſwer the Value in Damages together with Coſts, and that the Plaintiff ſhould recover the like at Common Law when the Cauſe is determinable there.*

There is a Proviſo in this laſt Act, *viz. That if the King had demiſed any of theſe Lands for Life or Years with a Covenant to diſcharge the Leſſee from the payment of Procurations,* that the Party claiming *them ſhall ſue in the Court of Augmentations and not elſewhere,* which Court is now annexed to the Exchequer.

But this Proviſo doth not extend where any Lands were granted by him in Fee, but only to ſuch caſes where the King had granted any particular Eſtates thereof, and therefore a Prohibition (*c*) was denied to ſtay an Excommunication for not paying Procurations upon ſuggeſting this Statute, and that the Party ought to be ſued in the Exchequer.

(*b*) Hatdres 180. (*c*) Hardres 388.

The Reformers of the Eccleſiaſtical Law (*d*) would hav the Viſitors Sequeſter the Profits of the Living in caſe of neglect or refuſal to pay Procurations, and to proceed againſt them by Eccleſiaſtical Cenſures, but the uſual Remedy is in the Spiritual Court unleſs it is claimed by Preſcription.

Prohibition.

I ſhall treat of this Subject only as it relates to the Spiritual Court, to which this Writ of Prohibition is directed, upon a Suggeſtion that it doth not belong to that Court but to the Courts of Law to take Cognizance of the matter.

It may be neceſſary in this place to mention the Conteſts which have formerly been made between thoſe Courts; for in the time of *H.* 3. the Prelates made ſeveral Canons directly againſt the Laws of the Land, (*e*) and my Lord *Coke* tells us what they were.

That they might try the Bounds of Pariſhes, the right of Patronage and of Tithes, and that no manner of Poſſeſſions which were held of the Church ſhould be tried in the Temporal Courts, and many more in ſubſtance (as he calls it) were then made againſt the *ancient and juſt Writs of Prohibition*, and to enforce Obedience to thoſe Canons the King himſelf was admoniſhed to obſerve them, or an Interdict was to be put upon his Lands and Revenues, his Subjects likewiſe were to comply upon pain of Excommunication.

But notwithſtanding theſe Admonitions, and tho' all the great Officers of State, and many of the Judges were then Clergy-men, yet they proceeded according to the Common Law, and with great difficulty kept the Spiritual Courts within their proper Juriſdiction, and this was done by granting Prohibitions to thoſe Courts where they encroached upon the Courts of Law.

This occaſioned the Clergy to exhibit ſeveral Articles to the Parliament *Anno* 51 *H.* 3. which were called *Articuli Cleri*, and which are ſince loſt.

But *Anno* 9 *Ed.* 2. the Archbiſhop of *Canterbury*, in the name of himſelf and all the Clergy, exhibited ſixteen Articles to the Parliament which were likewiſe called *Articuli Cleri.*

The firſt and fifth of thoſe Articles concern Prohibitions, and the Anſwers which were then enacted by the Parliament were as follow.

(*d*) Fol. 126. (*e*) 2 Inſt. 599.

That

That no Prohibition ſhall go where the Suit was for Tithes meerly as ſuch, but if a Parſon ſhould ſell his Tithes and then ſue for the Money in the Spiritual Court, a Prohibition ſhall be granted, becauſe by the Suit, the Tithes which were before Spiritual are turned into a Chattel.

So if the Tithes are once ſet out (*f*) and afterwards carried away by the Occupier of the Land, if the Parſon will ſue for them in the Spiritual Court, a Prohibition ſhall go, becauſe by the ſeverance from the nine parts they are become a Chattel, and he may maintain an Action of Treſpaſs for this wrong; but Juſtice *Croke*, (*g*) who Reports the ſame Caſe, tells us, the Court were divided, and the better Opinion was, that the Perſon who ſet out the Tithes might be ſued in the Spiritual Court for carrying them away, but not a Stranger.

The other Article was, that no Prohibition ſhall be granted where the Tithe is demanded out of a Mill newly erected, of which I ſhall treat more at large in another place.

I only mention theſe things to ſhew that in former times Prohibitions were granted to keep the Spiritual Courts within their due Bounds, which is plainly implyed by the Negative anſwers of that Parliament.

It would be a tedious buſineſs to give the Reader an account of the frequent Complaints of the Clergy almoſt in every King's Reign againſt theſe Prohibitions, eſpecially before the Reformation; I ſhall therefore confine my ſelf to what was done ſince.

It ſeems it was a common thing before that time to make unneceſſary delays in Suits for Tithes by obtaining frequent Prohibitions to the Eccleſiaſtical Courts.

Therefore *Anno* 2 & 3 *Ed.* 6. *cap.* 13. a Statute was made to prevent this Inconveniency, in which there is this Clauſe, *viz. Before a Prohibition ſhall be granted the Plaintiff therein ſhall bring a true Copy of the Libel concerning the Suit ſubſcribed by the hand of the Party, and there-under ſhall be written the Suggeſtion upon which the Prohibition is demanded, and if ſuch Suggeſtion is not proved by two ſufficient Witneſſes within ſix Months next after the Prohibition granted, a Conſultation ſhall be granted, and double Coſts and Damages awarded by the Courts of Law, which may be recovered by Action of Debt.*

Now the reaſon why a true Copy of the Libel ſhould be produced together with the Suggeſtion is, that it may appear to the Judges whether a Prohibition ought to be granted upon

(*f*) 2 Roll. Abr. 286. Plito. 41. (*g*) Cro. Eliz. 607, 844.

ſuch

ſuch a Suggeſtion, or whether there is any material variance between that and the Libel, as for inſtance, if the Libel is for Tithes the Defendant may ſuggeſt a *Modus*, which muſt agree with the Libel, becauſe 'tis grounded upon it, but if he ſuggeſt that the Land was diſcharged of Tithes in the hands of an Abbot or Prior, (*h*) and ſo ought ſtill to be diſcharged, and that the Parſon libelled againſt him for Forty Fleeces of Wool, and the Defendant pleaded, that he ſued him for 400 Fleeces, this is not a material variance, becauſe the Plaintiff preſcribed *in non decimando*, and ſo had wholly outed the Spiritual Court of any Juriſdiction.

But notwithſtanding this Statute, I find that the Clergy ſtill complained againſt granting Prohibitions, for in *Michaelmas Term Anno 3 Jac.* (*i*) Archbiſhop *Bancroft*, in the name of all of them, exhibited certain Articles to that King in Council againſt the Judges for ſome abuſe in granting the ſame which they deſired might be reformed, ſuggeſting that many Prohibitions were unduly obtained, and they were ſo exact in the computation, that they affirmed from the beginning of Queen *Elizabeth*'s Reign to *Michaelmas* Term 3 *Jac.* there had been 560 Prohibitions granted to the Court of Arches, and that not one in Ten was rightly awarded, but they were ſo cautious as not to name one in particular.

Then they ſuggeſted, that ſince both the Spiritual and Temporal Juriſdiction were become united in the Crown, it might be proper for the King in Council to rectifie what was amiſs in either, and not leave it to the determination of the Courts in *Weſtminſter-Hall.*

But the Judges anſwered, that Prohibitions were granted in order to keep the Spiritual Courts within their due limits, and that they ſhould not exceed that Juriſdiction which properly belonged to them, and that what was warranted by the Law in ſuch caſes could not be altered but by the Parliament; and they had likewiſe computed all the Prohibitions granted by all the Courts in *Weſtminſter-Hall* in that King's Reign, which amounted to 313 and no more, and that 180 of them were *de modo decimandi*, and the reſt were grounded upon Unity of Poſſeſſion, or where the Libel was of Tithes of Trees of twenty Years growth and upwards, for Tithes of Barren and Heath Lands, and concerning the boundaries and extents of Pariſhes.

Then they objected againſt the Form of Prohibitions in general, becauſe it imported that the Spiritual Courts were not

(*h*) Fitz. 79. (*i*) 2 Inſt. 601.

A

a foro Regio, and that the proceedings therein were *contra coronam & dignitatem Regis*, and tho' it was a received Opinion that the Eccleſiaſtical Court was *aliud forum* from the King's Courts when their Juriſdictions were diſtinct, yet it was very improper to affirm it ſo to be now when both thoſe Juriſdictions were united in the Crown.

To this Objection the Judges likewiſe anſwered, that both theſe Juriſdictions were always *de jure* in the Kings of this Realm, tho' one of them was frequently uſurped by the See of *Rome*; that the Forms of Prohibitions could not be altered but by the Parliament, and that it was *contra coronam Regis* for the Spiritual Court to uſurp on the Temporal Juriſdiction, becauſe it was to draw the People and their Cauſes *ad aliud Examen* than where by the Law they ought to be tried.

It will appear by the anſwers what the reſt of the Objections were, which anſwers being the Reſolutions of all the Judges of *England* are of great Authority in the Law, and therefore I will ſhew what they were and what proceedings have been in the like caſes ever ſince.

They all held that Prohibitions might be granted even after a Sentence in the Spiritual Court, for tho' by the proceedings there, their Juriſdiction might be affirmed, yet as it was a miſtake of that Court to hold Plea even at the inſtance of the Party in ſuch matters, which did properly belong to the Temporal Courts, ſo it was the folly of the Plaintiff to proceed there in any Cauſe not proper for their Judicature, and therefore the proceedings in ſuch Caſes are *coram non judice*, and Prohibitions may be granted at any time, as well after Sentence as before, but if the Defendant will confeſs the Allegation in the Libel, and thereupon Sentence ſhould be given, then 'tis too late to move for a Prohibition upon ſuggeſting any matter contrary to his Plea, for tho' his confeſſion cannot give any Juriſdiction where the Court had none before, yet this being meerly for vexation and delay of Juſtice (*k*) a Prohibition will not be granted unleſs he proves his Suggeſtion to be true.

'Tis true, Prohibitions ought not to be granted upon any frivolous Suggeſtion, which the Prelates objected had been too often done; as for inſtance, there was a Libel for Tithes, the Defendant ſuggeſted that he was diſcharged by the Parſon upon giving him a Cup of Buttered Ale, which cured him of a Cold, and upon this Suggeſtion he obtained a Prohibition,

(*k*) 12 Rep. 77. Noy 70.

but

but they do not tell us in what Court or in what Term, neither did they produce the Record; it was certainly a very ridiculous Agreement if any ſuch was made, and it could never be admitted a conſideration to diſcharge the Defendant from the payment of Tithes.

On a Collateral Suggeſtion. But Prohibitions may be granted upon a Suggeſtion of ſome Collateral matter, which doth not appear in the Libel it ſelf, as if the Suit is for Tithes of *Sylva Cædua*, the Defendant may ſuggeſt, that the Trees were more than twenty Years growth, ſo if the Suit is for Tithes in Kind, (*l*) he may ſuggeſt that the place is not within the limits of the Pariſh.

One Witneſs.] Prohibitions have been frequently denied in Cauſes which are proper for the Juriſdiction of Spiritual Courts upon a Suggeſtion that thoſe Courts refuſed the proof of one Witneſs, ſo is *Noy* 12. and five Years after that Reſolution the Defendant was ſued for Tithes, and ſuggeſted (*m*) that he *had a Leaſe of them*, which the Spiritual Court would not allow, becauſe he had but one Witneſs to prove it, but he could not have a Prohibition, for that Court having cognizance of the Original matter ſuch Suggeſtions had been uſually made for delay, but if he had *pleaded the Leaſe*, (*n*) and offered to prove it by one Witneſs, and the Court had refuſed that proof, in ſuch caſe a Prohibition would have been granted.

It hath been likewiſe denied where the (*o*) Suit was for a Legacy, and the payment was proved by one Witneſs.

But the later Authorities are otherwiſe; for if a Defendant pleads a Releaſe of the Legacy and proves it by one Witneſs, a Prohibition ſhall be granted if the Spiritual Court ſhould refuſe ſuch proof, becauſe at Common Law ſuch proof is good (*p*) even againſt a Record, for if there is a Judgment or Statute againſt a Man, he may prove the payment of the Money by one Witneſs, and that is admitted to be a very good proof, and ſo it is to prove the hand of a Witneſs (*q*) who is dead by one Witneſs living.

As for Legacies this diſtinction hath been made, that where it iſſues out of a Chattel (*r*) no Prohibition ſhall go to a Suit for ſuch a Legacy, but if it iſſue out of Lands, a Prohibition will be granted, becauſe the Spiritual Courts have no Juriſdiction of Lands.

(*l*) 2 Roll. Abr. 282. (*m*) 1 Cro. 269. 12 Rep. 67. (*n*) 2 Roll. Abr. 302. Hob 247. Yell. 92. (*o*) Her. 87. (*p*) Hob. 188. (*q*) Hob. 247. (*r*) 2 Roll. Abr. 234.

It has been likewiſe held that 'tis not properly a Legacy (z) where Lands are appointed to be Sold by Executors, and the Money to be divided; ſo that if a Suit is for any part of it, a Prohibition will be Granted.

Quare Impedit.

THIS is a Writ which lies for him who is ſeized of an Advowſon, and is diſturbed in the right of Preſentation, and becauſe 'tis now become the uſual remedy in ſuch Caſes, I ſhall give a ſhort account,

(1.) Of the Writ it ſelf.
(2.) Who may bring it, and who not.
(3.) Where it muſt be brought, and the form of the Declaration.
(4.) Of what things it lies.
(5.) Where it ſhall abate, where not.
(6.) Againſt whom it may be brought.
(7.) Of the Defendant's Pleas.
(8.) Of the Judgment in a *Quare impedit*, *&c.*
(9.) Of Writs of Error on ſuch a Judgment:

(1.) And firſt, as to the Writ, 'tis certainly very ancient, and my Lord *Coke* was ſo far in the right to tell us, that it was more ancient than the time of *Edw.* 1. (a) tho' he was in the wrong in citing *Glanvil* to prove it, (b) 'tis true, he wrote in the Reign of *Hen.* 2. but the places cited in the Margent of the Second Inſtitutes do not relate to a *Quare impedit*, but to an Aſſize *de ultima Præſentatione*, for that was the uſual remedy in thoſe days to recover Preſentations, and the reaſon is plain, becauſe an Aſſize was *feſtinum remedium*, for the Tenant ought to appear upon the Summons; if he failed, then then there was a Reſummons, upon which there could be no Eſſoign, and if he ſtill failed to Appear, the Aſſize was then taken by default.

If he did Appear upon the Summons, he could not delay the Demandant; 'tis true, he might take Exceptions either to the Writ or to the Return, but thoſe were ſoon determined; he might likewiſe pray a day to Plead, and if the Court gave him that Liberty, then the Jury was to Appear upon a new Proceſs, and in the mean time ſix of them were to view the Church, that they might put the Demandant into Poſſeſſion if he recovered.

(z) Hob. 265. (a) 2 Inſt. 355. (b) Lib. 13. cap. 20, 21.

But

But there were ſome inconveniencies in this way of Proceeding, for an Aſſize would not lie of a Prebend, becauſe by the form of the Writ the Jurors were required to view the Church, and therefore in reverence to the Cathedrals, where Prebends are, this Writ would not lie.

Neither could it be brought by the Demandant but where he or his Anceſtors had preſented, nor by Coparceners, becauſe of the privity which is between them, for that is contrary to the form of the Writ, which muſt always be brought againſt him *qui advocationem deforceat*, (*c*) and he who brings it muſt have the ſame Eſtate which he had when he made the laſt Preſentation, for if Leſſee for 40 Years preſented laſt, and afterwards his Eſtate became enlarged for his life, and then the Church had been void, he could not have an Aſſize *de ultima Præſentatione*, becauſe he had another Eſtate:

But in all theſe Caſes a *Quare impedit* would lie, tho' we rarely meet with any till after the Statute of * *Marlbrige*, becauſe at Common Law the proceedings in it were very tedious, *viz.* by Summons, Attachment and Diſtreſs infinite, and this was found to be very inconvenient to Patrons, by reaſon of the Lapſe which might eaſily incur by the long formalities in ſuch Proceedings, but by that Statute it was provided, that if the Defendant doth not Appear upon the grand Diſtreſs, (that is, upon a Writ directed to the Sheriff, commanding him to Diſtrein the Defendant *per omnes terras & catalla ſua, &c. Et quod habeat corpus, &c.*) then Judgment ſhould be given for the Plaintiff, and a Writ awarded to the Biſhop to admit his Clerk, and this is the courſe at this time.

About 18 Years after this Statute was made, we have an account of a *Quare impedit* brought by *Edw.* 1. againſt the Biſhop of *Litchfeild*, (*d*) and becauſe 'tis the firſt which is mentioned in our Books, 'tis probable that might be the reaſon why my Lord *Coke* tells us, that the Writ was as ancient as the Reign of *Edw.* 1.

It doth not appear in what Year of that King's Reign it was brought, but it muſt be after his 13th Year, becauſe the Judgment was, that the King ſhould recover his Preſentation, and have a Writ to the Biſhop to admit his Clerk, and that he ſhould recover Damages according to the Statute, which muſt be this Statute of *W.* 2. which was made in that Year.

But be it when it will it ſeems the Reporter was miſtaken in the Law, that the King ſhould recover Damages; for before that Statute, the Plaintiff in a *Quare impedit* could recover no

(*c*) 2 Roll. Abr. 381. * Anno 52. Hen. 3. (*d*) Fitzh. Abr. Tit. Quare Impedit 181.

Damages,

Damages, becauſe it lookt like a profit which ſavoured of Symony, and even after that Statute the King could not recover Damages, for he was not comprehended in that Clauſe by which Damages were given, *viz.* *That if the true Patron is diſturbed and he brings a* Quare impedit, *and pending the Suit the Biſhop ſhould preſent by Lapſe, in ſuch Caſe if the Plaintiff recovers he ſhall have Damages to two Years value of the Church, &c.* and there is a Judicial Writ in the Regiſter, to be directed to the Sheriff to impanel a Jury to inquire into the Value, *&c.* but if he did not loſe his Preſentation, the Plaintiff in ſuch Caſe was to recover but † half a Years value, *&c.*

Now the King could not be intended by this Clauſe, (*f*) becauſe he can never loſe his Preſentation.

But to return, my Lord *Coke* tells us, (*g*) that *Anno* 8 *E.* 1. there were three Writs *de advocationibus Eccleſiarum.*

(1.) *A Writ of right of Advowſon.*
(2.) *A Quare impedit.*
(3.) *De ultima Præſentatione.*

A Writ of Right Advowſon is, where one hath an Advowſon in Fee, and ſuffers a Stranger to preſent a Clerk, who is afterwards Inſtituted and Inducted by this Writ, he might recover his Right again, but a purchaſer could not have this Writ without alledging a Preſentation in his own time, and ſo muſt the Demandant in an Aſſize *de ultima præſentatione*, therefore a *Quare impedit* was provided to remedy this Inconveniency, for in ſuch an Action the Preſentation may be alledged in him of whom the purchaſe was made.

There was another inconveniency in the Caſes beforementioned, (*h*) for the Demandant in a Writ of right of Advowſon could recover only the Inheritance, and not the Preſentation, he could not remove the Incumbent, for he was not ſo much as named in the Writ, he was to be at peace whilſt the Parties were contending for the Right, and the reaſon was becauſe he might the better intend the Cure committed to his Charge.

Beſides, it was preſumed, that the Biſhop who had the care of the whole Dioceſs would do right to every Patron, and not admit any Clerk without juſt cauſe.

This was likewiſe remedied by the Statute of *W.* 2. and by the *Quare impedit*, (*i*) ſo as it was brought within ſix Months after the Inſtitution of the Clerk, for upon a recovery in ſuch Caſe he ſhall be removed.

---

† Co. Ent. 507. (*f*) 6 Rep. 51. Dyer 236, 245. (*g*) 2 Inſt. 355. (*h*) 6 Rep. 59. (*i*) W. 2. cap. 5. Anno 13 Ed. 1.

And

And 'tis to be obſerved, that the Biſhop and Incumbent are now uſually named in the *Quare impedit*, the one to prevent a Lapſe which might otherwiſe devolve on him *pendente lite*, the other that he might be made a (*k*) Party to the Suit, and ſo be removed by a Judgment obtained againſt him, without a *Scire facias* to ſhew cauſe why he ſhould not.

But the ſure way to prevent a Preſentation to take effect *pendente lite*, is to ſerve the Biſhop with the Writ *ne admittas*, *&c.* and if he ſhould afterwards admit any Clerk, and the Plaintiff ſhould recover, he may have a *Quare incumbravit*, *&c.* againſt the Biſhop, and ſhall remove him who came in *pendente lite*, let it be by what Title it will.

Who may bring it.] (2.) In the next place I ſhall ſhew who may bring a *Quare impedit*, and who not.

But before I proceed upon this matter it may be neceſſary to inform the Reader that there muſt be a Diſturbance to maintain this Action, and that the effect of it is to gain the Preſentation, and therefore a Man cannot have two Suits for the ſame thing, for 'tis the nature of this Action to be final, either upon a Diſcontinuance or a Nonſuit, (*l*) but he may have as many as he will againſt ſeveral Perſons.

The Grantee of the next Avoidance may maintain a *Quare impedit*, (*m*) againſt the Patron.

The Husband may have it alone where the Church of his Wife becomes Void, (*n*) during the Coverture.

And as the Grantee of the next Avoidance may have it, ſo may his Executors (*o*) for any Diſturbance in the life time of the Teſtator, and the Damages which they recover ſhall be Aſſets in their Hands, and this is within the equity of the Statute of 4 *Ed.* 3. *cap.* 7. (*p*) which gives Actions of Treſpaſs to the Executor, for a Treſpaſs done to the Teſtator.

If a Man builds a Church, and is diſturbed in the Preſentation, (*q*) he may have a *Quare impedit* without alledging a Preſentation by any one, (*r*) for that makes no Title.

But generally, he who will maintain this Action, muſt either alledge a Preſentation in himſelf, or in him under whom he Claims, and if there are diſtinct Patrons and Incumbents, the *Quare impedit* muſt be *præſentare ad mediet: tem Eccleſiæ*, but in ſuch Caſe it may alſo be *præſentare ad Eccleſiam*, (*ſ*) becauſe the half is but as one Church to him.

So where there are diſtinct Portions of an Advowſon in one and the ſame Church, as where one hath the firſt Portion, and

(*k*) 2 Cro. 92. (*l*) Hob. 137. (*m*) 2 Roll. Abr. 375. (*n*) 1 Inſt. 351. (*o*) Owen 131. Cro. Eliz. 811. (*p*) 1 And. 242. (*q*) Vaugh. 57. (*r*) 2 And. 49. (*ſ*) 10 Rep. 136. Dyer 79. *b.* 5 Rep. 102.

another

another the ſecond, *&c.* he who is diſturbed may have a *Quare impedit præſentare* to ſuch a part, (*t*) but he muſt declare that he was ſeized of the Advowſon of that part, and not alledge that he was ſeized generally, for if he doth, the Action ſhall abate.

But where there is but one Incumbent, tho' ſeveral Perſons have a right to the Advowſon, and to preſent by turns, yet the *Quare impedit* ſhall not be *præſentare ad medietatem*, (*u*) or to ſuch a part, but *ad Eccleſiam* generally.

Who may not.] It cannot be brought pending another *Quare impedit* againſt the ſame Defendant, and for the ſame Avoidance.

If a Biſhop collates wrongfully, as for Inſtance, upon a Deprivation, without giving the Patron notice of it, and then the Patron grants the Advowſon to another, this Grantee cannot have a *Quare impedit* (*x*) againſt the Biſhop and his Incumbent, becauſe it was a thing in Action which the Patron had deſtroyed by this Grant.

Where it may be brought, and of the form of the Declaration. It muſt be brought in that County where the Church is, but for an Advowſon in *Wales* the Writ muſt be brought in the next *Engliſh* County, that is, as my Lord *Vaughan* tells us, (*y*) when the Church is within the Marches of *Wales*, becauſe the Lords *Marchers* could not write to the Biſhops of *Wales*, which the Judges in their Circuits might do, where the Churches were within the ancient Shires belonging to the principality of *Wales*.

As to the Declaration 'tis not ſufficient for the Plaintiff to alledge (*z*) that he, or ſuch a Perſon from whom he Claims were ſeized of the Advowſon of the Church, but he muſt alledge a Preſentation made by one of them, for if not, the Defendant may Demur to the Declaration, except where a Man by the King's Licenſe makes a Church Parochial, and appoints it to be preſentable, there if he is diſturbed he may have a *Quare impedit*, without alledging a Preſentation in any Perſon, becauſe of the neceſſity of the thing.

Now, the reaſon why a Preſentation muſt be alledged in the Plaintiff is, becauſe in its nature 'tis Indifferent and Militant, as my Lord *Vaughan* calls it, and it may be annexed to ſuch a Title, which may prove the Defendant to have a right to the next Avoidance, therefore the Plaintiff muſt joyn the laſt Preſentation to his own Title, by which it may appear that he hath a right to preſent now as well as then.

(*t*) 2 And. 23. (*u*) 10 Rep. 136. 1 Inſt. 18. *a.* (*x*) Cro. Eliz. 811. Owen 131.
(*y*) Vaugh. 410, 411. (*z*) Vaugh. 57.

Of what things it lies. Next to the Declaration, it may be proper to give ſome account of what things it lies, as for Inſtance, it lies of a Donative, and in ſuch Caſe the Plaintiff muſt Declare (*a*) *quod permittat eum præſentare ad Eccleſiam.*

It lies for a Diſturbance to preſent to a free Chapel, which the Plaintiff hath by a Grant from the King, (*b*) if the Sheriff will not put him in Poſſeſſion, but in this Caſe, and likewiſe for a Diſturbance to preſent to any other Chapel, the Writ muſt be (*c*) *præſentare ad capellam.*

If 'tis in the Caſe of a Prebend it muſt be brought in that County where the Cathedral is, (*d*) and it muſt be *præſentare ad Prebendam*, (*e*) if of a Vicaridge it muſt be *præſentare ad Vicariam.*

It lies for a Deanry or Archdeaconry, (*f*) and generally for any Diſturbance to preſent upon the Avoidance of any Church.

Where it ſhall not abate, and where it ſhall. And becauſe of that prejudice which might incur on Patrons by reaſon of the Lapſe, therefore the Courts at *Weſtminſter*, even before the Statute of *Jeofails* were always very cautious not to abate this Writ, either for falſe Latin or for want of form, for tho' the Party might have a new Writ, yet if not brought within ſix Months from the Avoidance, the Church would Lapſe to the Biſhop.

Thus where the (*g*) adverb *Ad* was left out, *viz. quæ donationem ſuam*, inſtead of *ad donationem ſuam ſpectat*, this was amended.

So where it was *præſentare ad Eccleſiam*, (*h*) when the Title was to preſent to a Vicaridge it was amended, for *Vicaria eſt Eccleſia*, and ſo it was generally in any other Caſe, where it appears that the Miſpriſion of the Clerk was the occaſion of the fault.

If the Plaintiff, who was the Son and Heir of an Earl, ſhould have that Dignity by Deſcent, pending the Writ, it ſhall not abate, becauſe it was by the act of God.

It ſhall not abate by the death of one Coparcener or Joyntenant, where they are either Plaintiffs or Defendants, nor by the releaſe of one of them to the Incumbent of all Actions concerning the Preſentation, but it ſhall be a bar to him who gave the Releaſe, (*i*) and he ſhall be Summoned and Severed, and the other may Proceed.

(*a*) Co. Litt. 244. 2 Roll. Abr. 380. (*b*) 2 Roll. Abr. 336. (*c*) 2 Roll. Abr. 380. (*d*) Dyer 194. (*e*) Dyer 339. (*f*) Cro. Eliz. 141. Owen 99. 2 Lut. 1. (*g*) Cro. Eliz. 119. (*h*) 1 Rol. Rep. 237. Cro. Car. 74. (*i*) 2 Roll. Abr. 411.

The

The death of the Patron pending the Writ doth not abate it, that is, if a *Quare impedit* is brought againſt the Biſhop, Patron and Incumbent, as 'tis uſual; but in ſuch Caſe if Judgment ſhould be given againſt the Patron 'tis Erronious, (*k*) for it ought to be given againſt the other Two, and not againſt the dead Man.

So if the Incumbent ſhould die pending the Writ, and the Diſturber ſhould preſent again and die, a *Quare impedit* would lie upon the firſt Diſturbance, but it muſt be by *Fournies Accompts*, that is, tho' the firſt Writ is abated by the death of the Incumbent, which the Plaintiff could not avoid, yet if he bring a new Writ within 15 days after the abatement, that ſhall be a continuance of the firſt Writ, and ſhall prevent the Defendant to take advantage of any matter which might ariſe after that Writ firſt brought.

Where it ſhall abate.

'Tis certainly true, that the ſame Perſon ſhall not have ſeveral *Quare impedits* for one and the ſame Church, (*l*) for if he hath, one may be Pleaded in abatement to the other.

So if the Biſhop, againſt whom the Writ is brought, or any other Defendants (*m*) ſhould be miſnamed, 'tis a good cauſe of abatement, and ſo it is if the Plaintiff ſhould be made a Knight, pending the Writ, becauſe it was at his Election whether he would take that degree upon him or not.

So if the Plaintiff is Nonſuited after the Defendant appeared, or after he hath Pleaded, for this is peremptory and a good bar in any other *Quare impedit*, tho' brought within the ſix Months, (*n*) becauſe the Defendant upon a Title Pleaded hath a Writ to the Biſhop to admit his Clerk, which is a good bar to any other Action of that nature.

But if three are Plaintiffs, and two are Nonſuited, the Defendant ſhall not have a Writ to the Biſhop, becauſe the third may have a good Title.

And 'tis to be obſerved, that if it ſhould abate for any fault in the Declaration, (*o*) the Defendant ſhall have a Writ to the Biſhop to admit his Clerk, and ſo he ſhall if Judgment is given upon a Demurrer, but then the Defendant's Title muſt appear in the Declaration.

Tenants in Common.

If one Tenant in Common brings a *Quare impedit* againſt his Companion (*p*) who hath an equal Intereſt with himſelf, and this appears on the Declaration, and the Defendant Pleads it in abatement, yet he ſhall have no Writ to the Biſhop, becauſe he did

(*k*) Cro. Eliz. 324. (*l*) Hob. 137. (*m*) Hut. 77. (*n*) 7 Rep. 57. (*o*) Dyer 249. (*p*) 2 Roll. Abr. 387.

not make any compleat Title to himſelf, but only in common with another.

And now I have mentioned Tenants in Common, (q) I ſhall obſerve that they and Coparceners and Joyntenants ought to joyn in this Action; (r) but yet there is a Caſe where one Tenant in Common preſented alone, and upon a motion in Arreſt of Judgment this was objected, but it was over-ruled, the Book doth not tell us for what reaſon, but that upon the next Avoidance they might joyn, and if they were diſturbed a *Quare impedit* would lie, which can be no reaſon why one ſhould preſent, and ſo get the entire Patronage, ſo that this muſt be a miſtake in the Reporter, and he himſelf puts a quære to it.

Againſt whom it may be brought.

It hath been a queſtion whether the Patron, who is the Diſturber, ought to be named in the Writ, becauſe the naming him doth not ſeem to be Material; for if he is named, and ſhould die pending the Action, it ſhall not abate, as already hath been obſerved; beſides, the Incumbent who is the diſturber, is always in Poſſeſſion, (s) and he is eaſily known, but it may be difficult to find out who preſented him.

But now the Law is, that if the (t) Patron is not named in the Writ, the Incumbent may Plead it in abatement, but the Ordinary cannot have that Plea, becauſe his Acts do not depend upon the Patron's right.

And the reaſon ſeems to be very plain why the Patron ought to be named, for he ought not in common Juſtice to be diſpoſſeſſed of the Patronage, without being made a Party to the Suit, that he may have liberty to defend his Title, eſpecially where he is to be diveſted of his Inheritance by the Judgment given againſt him, tho' it may not be ſo material to name him where the Preſentation is only to be recovered.

But the naming the Incumbent doth not concern the Patron, (u) for he connot defend his Title, becauſe at Common Law he could not plead any Plea which concerned the right of the Patronage, yet he muſt be named in the Writ, for otherwiſe the Patronage, and not the Preſentation will be recovered, and by conſequence the Incumbent will not be removed.

If the Queen is Patroneſs, She may not be named in the Writ, and if She brings a *Quare impedit* She need not name the Patron who preſented laſt, unleſs where She hath a Title to preſent by Lapſe or by Symony, and in ſuch Caſes if She is diſturbed to preſent, She muſt name the Patron.

(q) 2 And. 23. (r) 1 And. 63. (s) 2 Leon 58. (t) 2 Cro. 651. (u) Hob. 193. 7 Rep. 26. 2 Lut. 1089.

So

So where a Biſhop hath collated by Lapſe a *Quare Impedit* may be brought againſt the Collatee without naming the Patron.

It is uſual likewiſe to make the *Ordinary* a Defendant, and the reaſon is to prevent a Lapſe, for if the Patron is diſturbed and the Church is not full, a Lapſe may incur *pendente lite* which my Lord *Coke* * tells us is prevented by naming the *Ordinary*, and that if in ſuch caſe he ſhould collate, his Clerk would be removed upon the recovery of the Patron in the *Quare Impedit*.

But ſome late Writers are of another Opinion, *viz.* That barely making the Biſhop a Defendant doth not prevent a Lapſe, unleſs he is alſo found to be a *Diſturber*, and that it cannot be for the Benefit of the Patron to name him in that Writ, for if by the naming him a Lapſe ſhould be prevented, then if the Patron ſhould recover againſt a Diſturber, he can only have Damages to half a Years value of the Church, but if a Lapſe is not prevented by naming him, and he ſhould collate becauſe the Patron was diſturbed, and did not recover his Preſentation within ſix Months after the Avoidance, then if he ſhould happen to recover afterwards, he ſhall have Damages to *two Years value* of the Church for the loſs of his Preſentation, and this is given by the *Statute W.* 2. *cap.* 5. but if making him a Party would prevent the Lapſe, then the Patron ought not to recover the two Years value in any caſe, becauſe 'tis his fault not to make the Biſhop a Party.

Having ſhewed who are to be made parties to this Action, I ſhall now give an account of the Proceſs againſt them which is by *Summons*, *Attachment* and *Diſtreſs*, and if brought againſt ſeveral, they may have ſeveral Eſſoins before Appearance, which may be taken either upon the Summons or Attachment, and if one of the Defendants is eſſoined, it muſt be adjourned for Fifteen Days, and the ſame day is given to the reſt, and if the Plaintiff doth not adjourn the Eſſoin he ſhall be non-ſuit.

But the Defendants are not bound to appear after they have caſt their *Eſſoins*, becauſe this may be done by a Stranger, but they muſt appear upon the *Grand Diſtreſs*, otherwiſe the Writ ſhall be awarded to the Biſhop, (*a*) and ſo it ſhall if they appear and make default.

So one may appear before the reſt, and Proceſs ſhall be continued till Diſtreſs can be had againſt them, and the Plaintiff may Declare againſt him who appeared, and if he

* 1 Inſt. 344, b. 2 Cro. 93. (*a*) 1 Roll. Abr. 587.

pleads *non impedivit, &c.* there ſhall be a Writ awarded to the Biſhop with a *Ceſſat Executio* till the other have pleaded.

The Biſhop, Patron and Incumbent who are uſually the Defendants in this Action, have all of them diſtinct Pleas.

And firſt the Biſhop if he hath no Title to collate uſually pleads that he claims nothing but as Ordinary, and ſo demands Judgment if he is not proved to be a Diſturber.

He can plead no other Plea, eſpecially if the Church is full, for having inſtituted a Clerk upon the Preſentation of another Patron, he cannot plead his Title nor counterplead that of the Plaintiff as the Incumbent may, becauſe the Ordinary hath nothing to do with the Patronage either in Intereſt or Dependency.

Then as to the Plea of the Patron, if his Clerk hath got Inſtitution he may plead a Title *pro forma*, and that by reaſon thereof he preſented, and that his Preſentee was admitted, inſtituted, and inducted, which is a full Poſſeſſion, and that will be a good Title till a better doth appear.

But if both are *out of Poſſeſſion* then they muſt plead a good and ſufficient Title, otherwiſe they cannot have a Writ to the Biſhop to admit the Preſentee, for in ſuch caſe both Plaintiff and Defendants are Actors, (*b*) and they muſt both ſet out their Titles by alledging a Seiſin of the Advowſon, and a Preſentation by the Patron, or at leaſt by thoſe under whom he claims.

In the next place as to the Incumbent's Plea, 'tis to be obſerved that before the *Statute* 25 *Ed.* 3. *cap.* 7. If a Patron had ſuffered a Benefice to Lapſe and the Biſhop had collated and afterwards the *King* pretending a Title had brought a *Quare Impedit* againſt the Ordinary and the Incumbent, he would certainly have recovered, becauſe as he was not bound by Lapſe, ſo the Defendants could not ſave themſelves, for they could not deny the King's Title and maintain the Patron's by their Plea, becauſe at Common Law they could not plead to the Title of the Parſonage but only in abatement of the Writ, and ſometimes the Patron would ſuffer Judgment to paſs againſt himſelf by Default without defending his Right.

So that if a Patron who had no manner of right had preſented within ſix Months after the Avoidance, and the true Patron had neglected to preſent within that time, and the Biſhop had refuſed the Preſentation of the wrongful Patron, and had collated by Lapſe, and thereupon that Patron had brought a *Quare Impedit* againſt him and the Incumbent, he

(*b*) Vaugh. 7. 8.

muſt

must have recovered, because, by the course of the Common Law, neither of them were suffered to controvert his Title.

But this inconveniency was remedied by that *Statute*, which gives the Incumbent power to counterplead *the King's Title*, and not only in his own case but in cases of *like nature*, that is, where a *Presentee* is Incumbent, (*c*) for he is *like* an Incumbent upon a *Collation*, and therefore since the *Statute* he may counterplead the Title of any other Person who shall pretend a right of Presentation to that turn to which he was presented or collated, (*d*) altho' he claims nothing in the Patronage himself.

But then he must be *persona impersonata*, (*e*) that is, he must be instituted and inducted into the Church, and so become a compleat Incumbent in Possession, and in such case if the Patron should make default or plead (*f*) an insufficient Plea it shall not be prejudicial to the Incumbent, for if the Patron confesses the Plaintiff's Title the Incumbent may deny it, (*g*) and set forth that of his Patron, and tho' he may in either of these cases pray Judgment and a Writ to the Bishop, yet no such Writ shall go to remove him till his Plea is determined.

'Tis likewise to be observed, that he must not only counterplead the Plaintiff's right, but must shew his Patron's Title, and therefore must set forth that he was presented and by whom, for that is traversable, (*h*) and by this means it will appear whose Title it is that he Defends, for he shall never make himself (*i*) *persona impersonata* by the Presentation of one Patron, and defend his Title under that of another, tho' it be a Title sufficient to destroy that of the Plaintiff.

But this must be understood where he pleads that he was presented by a *Stranger*, who is no party to the Action, for in such case he must alledge that his Patron was seised of the Advowson, or of the Mannor to which it did appertain, but if he pleads Plenarty *ex præsentatione* of the Plaintiff himself, or by *Collation* from the Bishop, there he need not set out any Title.

So that upon the whole matter, (*k*) the Patron and Incumbent cannot prejudice each other by their ill pleading, or neglecting to plead, for both have a distinct interest in the thing, *viz.* the *Patron* in the Advowson, and the Incumbent in his Freehold, and in the profits of the Church, and therefore it

(*c*) Hob. 321. Jones 4. (*d*) 7 Rep. 26. (*e*) March. 159. (*f*) Dyer 1, b. 3 Leon. 47. (*g*) Hob. 162. (*h*) Cro. Car. 591. (*i*) Hob. 319. Jones 5. 2 Lut. 1639. (*k*) 1 And. 238.

would be very unreaſonale that any Act of the *Patron* ſhould be prejudicial to his Clerk after he is Inſtituted, or that the Act of the Incumbent ſhould be injurious to the *Patron*.

But it may happen that neither the Plaintiff nor Defendant (*l*) may have Judgment, but a third Perſon, where it appears on the pleading that neither of them have any Title, as for inſtance, if one of our Univerſities ſhould bring a *Quare Impedit* againſt the Defendant, for that the *Patron* is a *Recuſant Convict*, and the Defendant pleads that the Advowſon was appendent to a Mannor, and that two parts thereof were ſeiſed by the Queen who granted the ſame to the Defendant *Cum pertinentiis*, here the Queen's Title appears upon the Record, and the Plaintiff could have none, becauſe the Queen had ſeiſed two parts of the Mannor, and by conſequence the Advowſon was veſted in her, neither could the Defendant have any right, becauſe a grant of a Mannor *Cum pertinentiis* did not paſs the Advowſon without naming it, therefore the Queen muſt have it, but where her Title appears only upon *Evidence* given, there 'tis otherwiſe.

Now, tho' the Incumbent cannot prejudice his *Patron*, yet he may deſtroy his own Title by ill Pleading, (*m*) as if he miſtakes a *Chriſtian name*, or if he varieth from the day on which the Plaintiff did alledge the Diſturbance to be made, as for inſtance, if the Plaintiff ſets forth the Diſturbance to be on the *29th day of March*, and the Defendant entitles himſelf to an Incumbency on the *5th of May* following, without traverſing, confeſſing or avoiding the day alledged in the Declaration.

But if he pleads *ne Diſturba pas*, or that there is no ſuch Church for which the Plaintiff had brought this Action, he ſhall have a Writ to the Biſhop, (*n*) for if there is no ſuch Church the Plaintiff can have no advantage by that Writ, and if there is, the Defendant hath no prejudice, for he doth not know it.

So if he pleads that pending the Writ the Biſhop did inſtitute another who was inducted, this ſhall not abate it, becauſe the Defendant did not deny the Plaintiff's Title or the Diſturbance, but only pleaded matter relating to the Biſhop.

He may plead that the Church is full *ex præſentatione* of the Plaintiff himſelf before the Writ brought and this will abate it.

(*l*) Moor 872. Hob. 126. (*m*) Jones 427. (*n*) Jones 427.

If

If there are ſeveral Defendants, and Judgment is had againſt one by Default, there ſhall be no Writ to the Biſhop till Judgment is likewiſe had againſt the other; and ſo 'tis if they (*o*) plead ſeveral Pleas, and one is tried for the Plaintiff, there muſt be likewiſe Judgment upon the other Pleas before he can have any effect of his Suit, and the reaſon is, becauſe he hath made ſeveral Diſturbers, and therefore muſt recover againſt all, for till that is done it doth not appear that the Title is in him.

But if a Writ is brought againſt two Defendants, and one of them appeareth upon the *Grand Diſtreſs*, and the other makes default, a Writ ſhall be awarded to the Biſhop to admit the Plaintiff's Clerk, and then if the other Defendant appears, and the Title is found for him, there ſhall another Writ likewiſe go to the Biſhop (*p*) to admit his Clerk, and both being admitted they may try the Right in an Action of Treſpaſs.

Now when the Defendants have pleaded according to their reſpective Rights, if the *Plaintiff* replies, and Iſſue is joined, the Jury muſt enquire into four things;

(1.) Whether the Church is full or not.

(2.) If full, then *ex cujus præſentatione*.

(3.) If ſix Months are paſſed ſince the Avoidance.

(4.) And laſtly of the * yearly value of the Church, which they are to find deducting what is paid out of it.

If they ſhould neglect to enquire into theſe particulars, (*q*) it may be ſupplied by a new Writ of enquiry, and no Writ ſhall go to the Biſhop (*r*) till the other is returned or the Damages releaſed, for till that time the Judgment is not given upon the whole Record.

So if the Jury give a Verdict for *Coſts*, which they ought not to do in the Action, yet if there is a Special Entry of the Judgment, *viz.* (*ſ*) *quod nullo habito reſpectu* to the *Coſts*, the Court awards that the *Plaintiff* ſhall recover *Damages*, this will help it and make it good.

Of the Judgment, and the effects of it.

The Judgment is to recover the *Preſentation* and *Damages*, of both which I ſhall treat diſtinctly.

As to the *Preſentation*, a Writ ſhall be awarded to the Biſhop, and in ſuch caſe the Incumbent muſt be removed if he was a party to the Suit.

(*o*) Brownl. 161. (*p*) 2 Inſt. 124. * Cro. Car. 593. (*q*) 10 Rep. 119. (*r*) Noy 66. (*ſ*) 1 Roll. Rep. 363. 3 Bulſt. 175.

'Tis

'Tis true, in *Boſwell's* Caſe (*t*) 'tis ſaid that if the Church is full of one who is a Stranger to the Writ, and if it happen to be *pendente lite* and the *Plaintiff* recovers, he ſhall have a Writ to the Biſhop to remove him, and tho' it ſhould afterwards appear that he had a right to continue Incumbent, yet the Biſhop is excuſed by the Writ.

But this Caſe is ſince denied to be Law, for regularly there ought not to be a Writ to the Biſhop (*u*) without a *Scire Fac.* firſt brought againſt the Incumbent to ſhew cauſe why the *Plaintiff* ſhould not have Execution, becauſe 'tis unreaſonable to turn a Man out of Poſſeſſion without giving him an opportunity to defend it.

'Tis true, the Biſhop (*w*) can be at no prejudice by admitting the Clerk for the reaſon before mentioned, tho' another is in Poſſeſſion, or tho' himſelf had collated pending the Action, but by his refuſal or making an inſufficient return to the Writ he may be fined, and a *Sicut alias* awarded to him upon a Penalty.

And not only ſo, but a *quare non admiſit* (*x*) lies againſt him, which muſt be brought in that County where the refuſal was made, but he may plead that the Church is litigious between the *Plaintiff* and a Stanger.

Writ of Error.] But the Defendants may bring a Writ of Error to reverſe the Judgment, and then the Court where the Proceedings are, may grant a *Supeſerdeas* to the Writ awarded to the Biſhop.

It hath been a Queſtion if the Biſhop (*y*) pleads that he claimed nothing but as Ordinary, and Judgment is obtained againſt him and the reſt of the Defendants, whether he ought to be joined in the Writ of Error, becauſe he hath no manner of Loſs, but the better Opinion is, that he ought to be joined, for he is a party to the Record.

If the Judgment ſhould be affirmed upon the Writ of Error, the *Plaintiff* in the Action ſhall have *Damages*, but the *Plaintiff* in Error ſhall have none, if the Judgment ſhould be reverſed, and upon ſuch reverſal the Judgment in a *Quare non admiſit* (*z*) if any ſuch ſhall be, muſt be alſo reverſed.

Damages.] As to the recovery of *Damages*, I muſt obſerve, that at Common Law none were recoverable in a *Quare Impedit*, they are given by the *Statute* of *W.* 2. (*a*) and are thus divided.

(*t*) 6 Rep. 51. (*u*) Sid. 93. (*w*) 3 Leon. 138. (*x*) Cro. Car. 342. Dyer 40. (*y*) Cro. Eliz. 62. 2 Cro. 94. (*z*) 8 Rep. 142. (*a*) W. 2. cap. 5. Anno 13. Ed 1.

If

If the Defendant diſturbs the true Patron, ſo that by ſuch Diſturbance the ſix Months paſs before he can recover, then if the Biſhop collates (as he may) the Patron loſes his Preſentation *pro hac vice*, and for that loſs he ſhall have Damages to *two Years value* of the Church upon his recovery againſt the Diſturber, and if he is not able to pay it, he muſt be committed for two Years.

But if the ſix Months are not paſſed, and the *Plaintiff* recovers within that time, then he ſhall have Damages only to *half a Years value*, becauſe he recovers his Preſentation, and if the Diſturber is not able to pay it, he ſhall be committed for half a Year.

But notwithſtanding this matter, (*b*) there is a late Authority, that in ſuch caſe the *Plaintiff* ſhall have no *Damages*, for if the Church is void he hath the Fruit of his Preſentation by a recovery within ſix Months after the Avoidance, and that if the Jury give any *Damages* there ſhall be a *remittitur* entred upon the Roll without moving the Court, and this is now become the conſtant practiſe in ſuch caſes, which ſeems very reaſonable.

Neither ſhall any *Damages* be had againſt the Biſhop where he claims nothing but as Ordinary, unleſs the *Plaintiff* will likewiſe prove that he is a *Diſturber*, for till then he is not convicted of any wrong.

The Queen can recover no *Damages* in this Action, becauſe ſhe cannot *loſe her Preſentation* by any Lapſe occaſioned by the Diſturber, and ſo ſhe is not within the firſt branch of the Clauſe of that *Statute* of *W.*2. and if ſhe is not comprehended in the firſt Clauſe ſhe cannot be in the ſecond, for they have an entire dependance on each other.

'Tis true this was made a Queſtion *Anno* 7 *Eliz.* (*c*) and it was held that the Queen ſhould recover Damages *pro valore medietatis Eccleſiæ*, and the Abridgment of *Fitzherbert* (*d*) is cited to prove it, which is likewiſe true; but in the ſame Book (*Titulo Damages*) 'tis held otherwiſe, and he cites a caſe *Paſchæ*, 3 *H.* 6. to prove it, but there is no ſuch caſe in the Year-Book in that Term, and if he was miſtaken in that, 'tis probable he might be ſo in the other, for *Anno* 31 *Eliz.* (*e*) it was adjudged otherwiſe, and a Judgment was reverſed becauſe *Damages* were given for the Queen.

(*b*) 3 Lev. 59. (*c*) Dyer 236, b. (*d*) Fitz. Abr. Tit. Quare Impedit 181. (*e*) Cro. Eliz. 162. 1 Leon. 249.

Regiſter, ſee Office in Biſhop, Archdeacon.

HAVING mentioned ſome things of a Regiſter in other Titles, I ſhall only add, that the Office of a Regiſter is grantable for Life, and if any Queſtion ſhould ariſe concerning ſuch Grant, it ſhall not be tried in the Spiritual Court but at Common Law, for tho' the ſubject matter of the Office is Spiritual, yet the Office it ſelf is Temporal.

And as it may be granted for Life in *Poſſeſſion*, (*f*) ſo it may be granted in *Reverſion*, and even to an Infant *Exercendum per ſe vel Deputatum ſuum*, but this muſt be underſtood where it hath been uſually granted in *Reverſion* for Life, and not otherwiſe.

And the better to regulate the practiſe of theſe Regiſters there are ſeveral Canons * made, *viz.* That *if a Regiſter or his Deputy ſhall receive any Certificate without the Knowledge or conſent of the Judge, or ſhall not cauſe a Perſon to be called who is cited to appear upon any Court day, or who ſhall put off the examination of Witneſſes, or ſhall not obey the lawful Monition of the Judge, or doth not write or cauſe to be written ſuch Citations and Decrees which are to be put in Execution, or ſhall not regiſter Wills, or ſhall ſet down any thing not decreed by the Judge, or in tranſmiſſion of Proceſs* ad quem *ſhall inſert any thing that is not true, or omit any thing negligently, or ſhall receive any Fee to favour the party in Cauſes commenced* ad inſtantiam partis, *or ſhall be of Council with either of them concerned in the Suit, or ſhall do any thing maliciouſly in the Execution of his Office to the prejudice of the Proceedings, in any of theſe caſes he ſhall be ſuſpended by the Biſhop for one, two, or three Months, according to the quality of his Offence, and the Biſhop may appoint ſome other Perſon to execute the Office during ſuch Suſpenſion.*

There is another Canon (*g*) to regulate their Fees, *viz.* they are to take only ſuch as were allowed by the Archbiſhop *Anno* 1597, under pain of Suſpenſion for ſix Months, and that if any Controverſie ſhould ariſe concerning their Fees, thoſe only ſhall be lawful for them to take which the Archbiſhop ſhall approve under his hand.

And by another Canon (*h*) two Tables of all Fees ſhall be ſet up by the Regiſter, one in the Conſiſtory Court and the other in his Office, which if he neglect, or being once ſet up ſhall remove them, or hinder any one to ſee them, he ſhall be ſuſpended.

(*f*) Cro Car. 556. * Canon 134. (*g*) Canon 135. (*h*) Canon 136.

Thus

(3.) Thus much concerning the Officer: I ſhall now mention the Canons, concerning a Book which is called a Regiſter; and firſt, by the Injunctions of *Edw. 6.* the Parſon and Pariſhioners are required to keep ſuch a Book in the Church to Regiſter the Names of the Perſons Married and Buried in the Pariſh; this Book is to be kept in a Cheſt provided for that purpoſe, and there muſt be two Locks and Keys for the Parſon and Churchwardens, and it muſt be taken out every Sunday after a Marriage or Burial, in order to Regiſter the ſame in the preſence of the Churchwardens; the Perſon who is in fault muſt forfeit 3 *s.* to the uſe of the Poor.

The ſame things are required by the * Canons of King *James*, but with a little Addition:

That a Parchment Book ſhall be provided at the Charge of the Pariſh, wherein the day of every Chriſtning, Wedding and Burial ſhall be Regiſtred, ſince the time any Law for that purpoſe was firſt made, and that was about the 30th of *Hen.* 8. at the requeſt, and by the means of the Lord *Cromwel*, and this was now required by the Canon ſo far as the ancient Books could be procured, but eſpecially ſince the beginning of the Queen's Reign; *That a Cheſt ſhould be provided at the Charge of the Pariſh with three Locks and as many Keys for the Miniſter, and each of the Churchwardens, ſo that neither of them ſhould take out the Book but when they were all preſent; that when a Page is full Written the Miniſter and Churchwardens ſhall Subſcribe their Names, and that the Churchwardens ſhall every Year in* April *tranſmit the Names of all Perſons Chriſtned, Married, or Buried to the Biſhop or his Chancellor, and the Days and Month in which it was Subſcribed by them, and if either of them make default he might be cited by the Biſhop or his Chancellor, and proceeded againſt as a contemner of the Canon.*

Reſidence.

I Shall not inſiſt on any Arguments in point of Conſcience for Reſidence, 'tis a Duty of which the Clergy are or ought to be Judges themſelves; but I muſt ſay, that when once they have taken a Perſonal Charge upon themſelves, and a Charge of ſo high a Nature as a Cure of Souls, it cannot be ſo well attended as where the Perſon is actually reſident.

Upon the firſt erecting Parochial Churches, every Clergyman was bound to reſide on his Living. The Old *Saxon* Canons * are very ſtrict in it, for how could a Man Read the Prayers of the Church, Preach to the People, Adminiſter the

* Canon 79.

Sacra-

Sacraments in his Church, reſolve Penitential Caſes, give a good Example to thoſe committed to his Care, unleſs he is conſtantly reſident amongſt them?

Reſidence is likewiſe required by the * Canons of our Church, *which prohibit Diſpenſations to be Granted for holding two Benefices, but only to ſuch who ſhall be thought worthy for their Learning, and very able and ſufficient to diſcharge their Duty, that is, ſuch who are Maſters of Arts in one of the Univerſities of this Realm, or who is a publick and ſufficient Preacher Licenſed*; and even in ſuch Caſe he muſt give ſufficient caution to make his Perſonal Reſidence in each of his Benefices, for ſome reaſonable time in the Year, and that they be not above 30 Miles diſtant from each other, and ſo that he hath an able Preacher lawfully allowed in the Benefice where he doth not reſide.

But it may be a queſtion that ſince the very Office of a Miniſter requires a Perſonal Reſidence, whether a Diſpenſation can juſtifie him to be abſent from that Charge without ſome very good Cauſe, as the care of his Health, or ſome publick and important buſineſs either for the Church or the Queen; for tho' by the Canon Law every Miniſter is to be reſident, and for that purpoſe if he is Choſen to any Office, he hath the King's Writ to Diſcharge him, which my Lord *Coke* tells us is grounded on (*a*) Scripture, *viz. Nemo militans Deo implicat ſe negotiis ſecularibus*, yet there are ſome Exceptions to this Canon, *viz.* If the Clergyman is in the King's Service he ſhall be Excuſed, and this appears by an ancient Writ in the (*b*) *Regiſter*, called *de non reſidentia Clerici Regis*, which I thus Tranſcribe.

Cum Clerici Noſtri ad faciendam in Beneficiis ſuis perſonalem reſidentiam dum in noſtris immorantur obſequiis compelli aut alias ſuper hoc moleſtari ſeu inquietari non debeant, noſq; ac progenitores noſtri quondam reges Angliæ hujuſmodi libertate & privilegio pro clericis noſtris a tempore quo non extat memoria ſemper hactenus uſi ſumus vobis mandamus quod dilectum Clericum noſtrum J. S. *parſonam Eccleſiæ de* H. *veſtræ Dioceſeos qui in cancellaria noſtra noſtris jugiter intendit obſequiis ad perſonalem reſidentiam in beneficio ſuo pred. faciend. dum in iiſdem obſequiis noſtris immoratur nullatenus compellatis & ſequiſtrum ſi quod in fructibus aut aliis bonis Eccleſiæ ſuæ pred. ea occaſione per vos aut veſtros fuerit appoſitum ſine dilatione relaxari faciatis, Teſte*, &c.

Agreeable with this Writ is the Statute called (*c*) *Articuli Cleri, viz.* That Clerks employed about the Exchequer ſhall not be Bound to be reſident in their Churches; and that the

* Canon 41. (*a*) 2 Tim. 2, 4. (*b*) Regiſter 58. F. N. B. 44. E. (*c*) Art. Cleri. cap. 8.

King

King and his Anceſtors, time out of mind have uſed, that Clerks employed in his Service ſhall not be compelled to keep Reſidence in their Benefices; and ſuch things as ſhall be thought neceſſary for the King and Common-wealth ought not to be prejudicial to the Church; and my Lord *Coke* (*d*) tells us, that this Paragraph ought to be Written in Letters of Gold.

The Law allows ſome other Excuſes for Non-reſidence, as Impriſonment without Fraud, removing into a better Air for the recovery of his Health; and by the Statute of 21 *Hen.* 8. a Scholar ſtudying in the Univerſity, the Queen's Chaplains in Ordinary, and any Perſon compelled by the Injunction of the Lord Chancellor to appear in any Suit in Equity, (*e*) and therefore if an Information ſhould be brought upon the ſaid Statute againſt a Non-reſident, for the forfeiture of 10 *l. per* Month, it muſt be ſet forth that the Defendant Voluntarily did Abſent himſelf, *&c.* or 'tis naught.

So by the Statute of 25 *Hen.* 8. *cap.* 16. the Judges of the King's Bench and Common-Pleas, the Chancellor, and the Chief Baron of the Exchequer, and the Queen's Attorney and Solicitor, may have each of them one Chaplain to be attendant on their Perſons, who may be Non-reſident.

And by the Statute of 33 *Hen.* 8. *cap.* 28. the Chancellor of the Dutchy of *Lancaſter*, and Groom of the Stole may have the like, but then they muſt twice in every Year reſide on their Benefices for the ſpace of 80 Days each time, under the Penalty of 40 *s.* but none of theſe Perſons can qualifie a Man to hold two Livings.

My Lord *Coke* farther informs us, that Cardinal *Woolſey* was a great Protector of Non-reſidents, and that ſoon after his Attainder a Statue (*f*) was made, which in the Preamble mentions ſeveral good Effects of Reſidence, *viz.* that it would be for the Virtuous encreaſe and maintenance of Divine Service; that it would advance the Preaching and Teaching of God's Word, by Godly and good Example; that it would be for the maintenance of Hoſpitality, the relief of the Poor, the increaſe of Devotion, and the good opinion of the Laity towards the Clergy; and then by the 17th Paragraph 'tis enacted, *That every Spiritual Perſon promoted to an Archdeaconry, Deanry or* DIGNITY *in a Cathedral or Collegiate Church, or Beneficed with a Parſonage or Vicarige ſhall be perſonally reſident on his* DIGNITY, *Prebend or Benefice, and if he* **wilfully** *abſent by the ſpace of one Month together, or of two Months, at ſeveral times*

(*d*) 2 Inſt. 625. (*e*) Cro. Eliz. 100. (*f*) 21 H. 8. cap. 13.

in

in one Year, he forfeits 10*l. per Month, to be divided between the Queen and Proſecutor.*

And by the ſame (*g*) Statute the Chaplains of ſeveral Peers, by being retained in their Service, may obtain Diſpenſations to hold two Livings, and in ſuch Caſe are Excuſable for Non-reſidence in one, which cannot be, if by the other Paragraph they are puniſhable for being Abſent from one of them, therefore this Clauſe muſt not be interpreted to bar thoſe who are qualified by Birth, Degree or Retainer to hold two Livings from that Liberty they have to Abſent themſelves from one, ſo as they reſide on the other.

There are very few Inſtances of Proſecutions upon this Statute, (*h*) which muſt be brought by Information in the Crown Office, but ſome there are, *viz.* (*i*) *Anno* 41 *Eliz.* an Information was brought for the 10*l. per* Month; the Defendant Pleaded that he was Choſen Goſpeller of St. *Paul*'s in *London*, and that he was reſident there by reaſon of that *Dignity*, and upon Demurrer to this Plea, two Judges were of opinion that it was a *Dignity*, to Excuſe the Defendant from being reſident on his Benefice.

And 'tis to be obſerved, that the word *Dignity* in this Statute relates only to *Dignities* of the like, or inferior nature, to Archdeaconries or Deanries, and therefore Biſhopricks are not comprehended under that Appellation; but if Biſhops are not reſident they may be puniſhed by Eccleſiaſtical Cenſures, but not by this Statute; (*k*) and of this we have a very notable Inſtance, for even when the Pope's Supremacy was exalted here, *Hen.* 3. ſent his Mandate to the Biſhop of *Hereford* to reſide on his Biſhoprick, otherwiſe he would ſeize his Temporalties; but if he hold any other *Dignity* in *Commendam* with his Biſhoprick, then he is comprehended in this Law.

And as by theſe Statutes, ſo by the Canon Law Non-reſidence is allowed, that is, 'tis not abſolutely forbidden: As for Inſtance, 'tis allowed by that Law where the Benefice is annexed to ſome *Dignity* in the Church, and in ſuch Caſe there muſt be a Vicaridge Endowed, but the Vicars who ſupply the places of thoſe Dignified Perſons are not only bound to Perſonal Reſidence, but by a Conſtitution of Archbiſhop *Langton* are required to take an Oath to reſide on their Vicaridges, and the Reaſon why a Vicar is more ſtrictly obliged to Reſidence than a Rector is, becauſe he may depute a Vicar, but one Vicar cannot depute another, and therefore his Oath is to reſide on his Vicaridge *niſi aliter Diſpenſatum fuerit a Diocæſano ſuo.*

(*g*) Paragraph 11. (*h*) Cro. Car. 146. (*i*) Cro. Eliz. 663. (*k*) 1 Inſt. 25.

By

By the Canon Law a Miniſter is ſaid to be reſident in that place where he Diſcharges his Office, tho' he Lives in another Pariſh; but the Courts at *Weſtminſter* have a different acceptation of Reſidency, for it hath been a queſtion whether the Reſidence intended by this Statute muſt be in the very Parſonage Houſe, and my Lord *Coke* (*l*) tells us, it was reſolved, that tho' the Parſon lives in the ſame Pariſh, yet if he doth not live in the Parſonage Houſe he is Non-reſident, and the Reaſon is, becauſe one thing intended by the Statute was to prevent Dilapidations, which might not be ſo well done where a Tenant and not an Owner dwells in the Houſe.

Juſtice *Croke*, Serjeant *Moor*, and Mr. *Gouldsborough*, who Report the ſame Caſe, all agree that the Court was divided; but the better opinion was, that if the Parſon is reſident in any other Houſe in his Pariſh 'tis ſufficient; for the Parſonage Houſe might be aliened by a former Parſon, with the conſent of the Patron and Ordinary, or Leaſed ſo as his Succeſſor might not live in it.

About 12 Years afterwards there happened the very like Caſe, (*m*) and it was objected, that ſince the Statute requires the Parſon to be reſident on his Benefice, that it muſt be intended his Parſonage Houſe, becauſe the whole Pariſh is properly his Benefice, and therefore in propriety of Speech he cannot be ſaid to reſide on the whole. The Caſe was compounded by my Lord *Coke*, but he continued ſtill in his former opinion, that the Parſon ought to be reſident in his Parſonage Houſe, tho' the Reaſons given by his Cotemporaries ſeem to be of greater weight and Authority.

There are ſome other Statutes which relate to Reſidency, as for Inſtance, the Statute of 13 *Eliz. cap.* 20. provides, That all Leaſes made of any Benefices ſhall endure no longer than the Leſſor ſhall be reſident, *and ſerving his Cure without abſenting above* 80 *days in one Year*, and if he ſhall ſo abſent the Leaſe ſhall be Void, and he ſhall loſe a Years profit of his Benefice to be diſtributed by the Ordinary amongſt the Poor, that is, upon complaint made to him, and Sentence given for this Offence, he may within two Months after ſuch Sentence and requeſt made by the Churchwardens or one them, Sequeſter the profits to ſome of the Pariſhioners, and if the Ordinary ſhould neglect, then every one of them may retain the Tithes, and the Churchwardens may enter on the Glebe Rents and Duties of the Church, and employ it for the uſe of the (*n*) Poor, till a Sequeſtration ſhall be made by the Ordinary.

(*l*) 6 Rep. 21. Cro. Eliz. 590. Moor. 540. Gouldſ. 169. (*m*) 2 Brownl. 54. (*n*) 18 Eliz. cap. 11.

But there is a Proviſo, that every Parſon qualified to have two Benefices, may Demiſe one of them to his Curate only; but ſuch Leaſe is to endure no longer than he is Curate, and not abſenting above 40 days in any one Year.

By another Statute (*o*) all Covenants and Contracts made for permitting any Perſon to enjoy any Benefices, *ſhall be as Leaſes made thereof*, that is, they ſhall be Void within the Act of 13 *Eliz.* by the Parſon's abſence above 80 days.

Now, a Non-reſidency within the Statute of 21 *H.* 8. may not be an abſence to avoid a Leaſe upon the Statute of 13 *El.* for if a Parſon lives in another Pariſh, and not in his Parſonage-houſe, which, according to my Lord *Coke*'s opinion is a Non-reſidency within the Statute of *H.* 8. yet 'tis not ſo within the Statute of 13 *Eliz.* (*p*) for if he comes conſtantly to his Pariſh Church and Officiates there, he can never be ſaid to be *abſent from his Cure.*

I ſhall conclude this Title with the Obſervation of Father *Paul*, (*q*) in his Hiſtory of the Council of *Trent*, that for the firſt Seven hundred Years after Chriſt, every Miniſter in the *Weſtern* Church was reſident on his Living, and that when a contrary uſage crept into the Church, Canons and Decrees were made againſt it.

That it was the opinion of that Council, that Reſidence is a thing of Divine right to him who hath a Cure of Souls, and if ſo, it muſt be a great evil for a Clergy-man to take two Benefices, for 'tis impoſſible for him to reſide on both at the ſame time.

But notwithſtanding this opinion, and all the Canons which have been made againſt Non-reſidence, ſome Arguments have been raiſed to prove that 'tis only *malum quia prohibitum*, for if it was Evil in its ſelf, than no Diſpenſation could make it otherwiſe, and we daily ſee that the Law allows Diſpenſations for Pluralities, and by conſequence it allows a Man to be Non-reſident.

It has been likewiſe affirmed with ſome colour of Reaſon, that the Clergy do not undertake any Cure, but under ſuch meaſures which are allowed by Law, and that a competency is always ſuppoſed where Reſidence is ſtrictly enjoyned, and where that cannot be had by one Benefice, the Church hath power to mitigate the Severity of the Canons, and to Diſpenſe with the taking more than one.

That the Clergy do not ſubſiſt now as formerly, when thoſe Canons were made, for then *Celibacy* was enjoyned, but now

(*o*) 14 Eliz. cap. 11. (*p*) 1 Bulſt. 111. (*q*) fo. 496.

Marriage is allowed them by Law, ſo that a Living which is allowed a competency for a Single Perſon at that time will not be ſufficient to maintain a Family now, and that there can be no inconveniency in Pluralities, becauſe the Biſhop is to take care that the Benefices where the Parſon himſelf cannot be reſident ſhould be ſupplied with able Curates.

But after all, ſince it was Originally intended by thoſe Canons, that a Miniſter ſhould not undertake more than he is able to perform, and ſince the Cure of Souls is perſonally committed to him by the Biſhop, I muſt leave it to the Conſciences of thoſe who are concerned, whether any Diſpenſation can be good in ſuch Caſe.

Reſignation.

THIS is the yielding up a Benefice into the Hands of the Ordinary; 'tis called Renunciation by the Canoniſts, and 'tis the ſame thing with a Surrender at Common Law, but uſage hath reſtrained this word, and made it applicable only to a Spiritual Living.

And therefore I cannot apprehend why the word *Reſigno* (*r*) ſhould be thought improper in the Latin form of a Reſignation, certainly it muſt be a meer nicety of the Judges *Anno* 12 *Eliz.* to hold it ſo, and to affirm that the formal words are *renuncio cedo & dimitto*, for I find the word *Reſigno* almoſt in all the forms of Reſignation, (*ſ*) 'tis ſo in *Fairchild* and *Gayre's* Caſe, where the words are *concedo & Reſigno*, 'tis ſo in the Regiſter, (*t*) which being one of the moſt ancient Books in the Law, and of great Authority, I ſhall tranſcribe the form as 'tis there.

In Dei nomine Amen, *Ego* J. S. *Rector & Incumbens Eccleſiæ Parochialis de* H. *in Com.* S. *& Dioceſ. Ciceſtriæ, volens & ex certis cauſis & conſiderationibus, veris juſtis & legitimis me in hac parte ſpecialiter moventibus, ab onere cura & regimine dictæ meæ Rectoriæ de* H. *& pertinen. ejuſdem, penitus Exonerari eandem Rectoriam meam, & Eccleſiam parochialem pred. una cum ſuis juribus membris & pertinentiis univerſis, in manus Reverendi patris* Johannis, *permiſſione divina, Ciceſtriæ Epiſcopi loci iſtius Ordinarii & Dioceſani vel ejuſdem Vicarii in Spiritualibus generali ſeu alterius cujuſcunque hanc meam Reſignationem admittend. poteſtatem habentis vel habituri non vel in metu coactus nec dolo malo ad idem inductus nec aliqua finiſtra machinatione motus, ſed ex certa ſcientia animo deliberato & ſpontanea voluntate meis pure ſimpliciter & abſolute Re-*

(*r*) Dyer 294. Sid. 389. (*ſ*) 2 Cro. 63. (*t*) Fo. 306. b.

ſigno ac re & verbo vacuam dimitto, jure quoque titulo & poſſeſſione meis in eadem Rectoria ſive Parochiali Eccleſia una cum ſuis juribus membris & pertinentiis univerſis præhabitis & mihi hactenus conceſſis omnibus & ſingulis renuntio eoſdemq; cedo & ab iiſdem recedo totaliter & expreſſe in his Scriptis. In cujus rei Teſtimonium Nomen & Sigillum meum his præſentibus appoſui 5 die Aprilis, Anno, &c.

Signat. & atteſtat. nobis
præſentibus & atteſtantibus.

That which I ſhall obſerve upon this Latin form is, that a Reſignation muſt be made to the Ordinary; (*u*) 'tis true, it may be made before a Publick Notary, but it muſt be directed to the Biſhop and certified to him, and if 'tis in the Caſe of a Prebend it makes no alteration of the Law, for it muſt be reſigned to the Ordinary, and not to the Queen, becauſe if a common Perſon is Patron thereof, an injury may accrew to him for want of notice to the Reſignation, which the Queen is bound to give.

And generally where-ever a Biſhop hath right to Admit, he hath likewiſe a right to take a Reſignation, (*x*) therefore Donatives are not reſigned to him, but to the Patron, becauſe he doth not admit to ſuch a Cure; and Deanries (*y*) in the Queens Gift are not reſigned to him, but to the Queen.

In the next place I ſhall obſerve that it muſt be made to a Superior, *ſponte pure & abſolute*, and therefore if 'tis made upon condition that another ſhould be Admitted to the Benefice tis Void, unleſs it is in Caſes of Exchange; for if two Clergymen would Exchange Benefices, each of them muſt reſign to the proper Biſhop, and the reſpective Patrons muſt preſent them again to each Benefice, which, if they refuſe, or the Ordinary will not Admit them reſpectively, then the Exchange is not Executed, and in ſuch Caſe either Clerk may return to his former Living, tho' one of them ſhould be Admitted, Inſtituted and Inducted to the Benefice of the other, becauſe in Caſes of Exchange (*a*) the Law doth annex a Condition to the Reſignation, *viz.* that it be fully executed on both ſides, and not only ſo, but the Condition is expreſſed in the very form of the Exchange it ſelf.

Exchange.

In Dei nomine Amen, *Ego* J. S. *Rector Eccleſiæ de* H. *Dioceſeos Ciceſtriæ volens ipſam Eccleſiam meam cum Eccleſia* (*b*) *de* B. *dictæ Ciceſtriæ Dioceſeos cujus Rector Exiſtit* W. C. *certis juſtis & legitimis cauſis ſine dolo & fraude canonice permutare ipſam Eccleſiam meam ex cauſa permutationis hujuſmodi & non alio modo in ſacras*

(*u*) 2 Roll. Abr. 358. Noy 147. (*x*) 2 Cro. 63. (*y*) Plowd. 398. (*z*) 1 Roll Rep. 137. Owen 12. (*a*) Fiz. Exchange, Plito 10. (*b*) Regiſter 306. *b*.

manus

manus venerabilis in Chriſto patris Dom. Johannis Ciceſtriæ Epiſcopi reſigno ſupplicans humiliter & devote ut præfat. J. S. *hujuſmodi cauſa permutationis ipſam reſignationem ſic factam & non aliter velitis admittere & negotium permutationis hujuſmodi quatenus ad vos attinet fideliter expedire, & proteſtor expreſſe in hic Scriptis quod ſi dicta permutatio debitum non ſortiatur effectum quod hujuſmodi mea reſignatio pred. pro nulla penitus habeatur.*

And in the ſame Book there is a Form of a Proteſtation of returning again to his old Benefice in caſe the Exchange is not executed, and it was my Lord *Hobert*'s Opinion in (*c*) *Colt* and *Glover*'s Caſe, that each Party might return to his proper Benefice where the Exchange was not compleat.

By this ancient Form it appears that the Exchange muſt be made *juſtis & legittimis Cauſis*; and agreeable with this is that Paragraph in the *Statute* againſt (*d*) Simony, *viz. That if any Incumbent with Cure, &c. ſhall corruptly reſign or exchange his Benefice, or ſhall corruptly take any Benefit for reſigning, &c. both the Giver and Taker ſhall forfeit double the value of the Benefice to be divided between the Queen and the Proſecutor.*

After a Reſignation is made, 'tis in the power of the Ordinary whether he will accept it or not, for ſince the Law hath made him the proper Perſon to whom it ought to be made, it hath likewiſe truſted him with judging whether he ſhall accept or refuſe it.

'Tis agreed that a Reſignation (*e*) is not good unleſs the Ordinary *accepts* it, but this muſt be underſtood of a Benefice *with Cure, &c.* for in ſuch caſe a Reſignation is not good unleſs the Biſhop accepts it, becauſe it may be prejudicial to many without ſuch acceptance, (*f*) but where there is no Cure 'tis good without acceptance.

Laſtly, If an Action of Debt ſhould be brought on a Bond (*g*) given to the Patron, conditioned to reſign a Benefice to the Ordinary of the Dioceſs, ſo that the ſame may be void, and that it may be lawful for him to preſent again, if the Defendant pleads that *in forma juris reſignavit*, the Rectory to *W.* then, and now Biſhop of *D.* Ordinary of the place, which Reſignation he accepted, this ſhall be tried by a Jury and not by a Certificate from the Biſhop.

(*c*) Hob. 152. (*d*) 31 Eliz. cap. 6. (*e*) 2 Cro. 64, 198. (*f*) Noy 147. (*g*) Sid. 377.

Sacrament.

THIS is the moſt ſolemn Act of Worſhip amongſt us; it was inſtituted by our Saviour himſelf, and therefore 'tis not like other Rites by which we expreſs our Duty to God, for thoſe may be enjoined by the Church.

It conſiſts in *matter and form*, that is, there muſt be material things Sanctified by proper words, by which thoſe things are determined to that end, and in receiving it there are federal Acts of Religion both in reſpect to God and our ſelves, *viz.* on God's part by a ſecret Bleſſing derived from him to us, and on our part by Promiſes which unite us to his Church, and by this means Divine Grace is conveyed to us.

The learned *Biſhop of Sarum* tells us, that this part of Worſhip hath been more corrupted than any other, which was chiefly occaſioned by theſe words, *viz. This is my Body*, and that in every thing elſe the Inſtitution was both plain and eaſie, but by thoſe words the People were taught to believe that Chriſt was corporally preſent in the Sacrament, and therefore the Prieſts did magnifie it with all external Pomp and Shew, for the Veſſel in which it was put, and the Garments in which he officiated were Conſecrated and anointed with great Solemnity and Devotion, then the Bread was lifted up and Worſhipped by the People, the Prieſt carrying it under a very rich Canopy.

The words of Conſecration were always ſpoken by the Prieſt, but not in the preſence or hearing of the People, which (as that learned Prelate rightly obſerves) was very ſuitable to the inviſible change made of the Elements of Bread and Water, *viz.* for as the one could not be ſeen, ſo the other was not to be heard.

And not only ſo, but ſome miraculous Stories were invented and offered to the People as reaſons why the words ſhould be kept ſecret from them, *viz.* becauſe certain Shepherds having by chance heard a Prieſt conſecrating the Wafer, did themſelves repeat the words over their own Bread, and immediately it turned into Fleſh.

The ancient Fathers of the Church had no notion of ſuch a miraculous Tranſubſtantion, and as ſoon as ever it came to be extolled by the Prieſts, there were ſeveral learned Men in the ninth Century who wrote againſt it; and 'tis no wonder that the Prieſts were ſo induſtrious to propagate this Doctrine, becauſe the People muſt neceſſarily have a very great reverence for an Order of Men whoſe Character qualified

ſied them for ſuch miſterious Performances, ſo that in the eleventh and twelfth Centuries it came to be generally believed.

For the firſt 300 Years after this ſtrange Doctrine was received, it was uſual to Conſecrate a whole Loaf, which immediately turned into the compleat Body of Chriſt, ſo that when it was diſtributed to the People, they were made to believe that one had a Toe, another a Finger, and a third an Eye or Tooth, and to ſupport their Belief in ſo odd a Contrivance, ſome Miracles were pretended to be done by every part of the Body.

But this being thought a very undue and indecent way of eating the Body of our Saviour, the Schoolmen who had always ſome nice inventions to pleaſe the People, inſtructed them to believe that the whole Body was in every part of the conſecrated Bread, and that upon dividing it a new Body was immediately ſeparated from the other parts.

Now if the Body ſhould not happen to be new, 'tis certain the invention was ſo, and contrary to what had been the received Opinion for many Years, ſo that the Miracles which were pretended to be done by thoſe old parts of Chriſt's Body were become uſeleſs, and therefore there was a neceſſity of contriving new ones to ſupport this new Opinion; and as that great Prelate farther informs us, inſtead of a Loaf they conſecrated a Wafer as more ſuitable to this new Doctrine, that it might not be contradicted too much by our Senſes; and leſt the ſenſible effects of Wine might diſpoſe the People to believe that notwithſtanding the Conſcration it remained ſo ſtill, therefore the Cup was denied to the Laiety.

Anno 2 Ed. 6. theſe things were thought proper to be reformed, and for that purpoſe a new Office for the Communion was ſet forth, which began with an Exhortation before the receiving it, and it was almoſt the ſame with what is uſed now, only after that part of the Exhortation wherein we are adviſed to confeſs our Sins to God, 'tis added, *That thoſe who approved auricular Confeſſion to a Prieſt ſhould not cenſure thoſe who were ſatisfied with this general Confeſſion to God.*

Then after the Prieſt had received he was to return to the People, and to read another Exhortation to them, which we now uſe with a very little variation in all other Circumſtances; only when the Bread was to be diſtributed the Prieſt pronounced theſe words, *viz. The Body of our Lord, &c. preſerve thy Body, &c.* but when the Cup was given the words were, *viz. The Blood of our Lord, &c. preſerve thy Soul, &c.* as if a greater value was to be ſet on the Cup than on the Bread, for

one was to preſerve the *Body*, but the other the *Soul*, but this was afterwards altered by Archbiſhop *Granmer*, who appointed that in both Paragraphs the words ſhould be *preſerve thy Body and Soul*, &c.

As to the Poſture in receiving the Sacrament, 'tis probable that at the firſt inſtitution it was at a Table, the Communicants lying on one ſide; but that can be no Argument why it ſhould be ſo now, for ſince the Euchariſt came in the room of the Paſſover, and ſince that was altered from its firſt inſtitution by *Moſes*, to which alteration our Saviour himſelf complyed, therefore this may be likewiſe altered without any Crime.

The *Jews* were to eat the Paſchal Lamb ſtanding with their Loins girt, and with Staves in their Hands, and Shews on their Feet, which was a poſture ſuitable to Travellers as they were, but as ſoon as they came out of the Wilderneſs to the Land of Promiſe, that poſture was laid aſide, and then they eat the Lamb at the Table, and in ſuch a poſture as they eat at other times.

Our Saviour conformed to this, and he being now exalted in his Throne, it may therefore be more proper to receive the Sacrament with greater ſigns of outward reſpect than when he was in a State of Humiliation, in which State he was at the very firſt Inſtitution of this Ordinance.

But ſince the receiving the Sacrament is now become a legal Qualification to entitle certain Perſons to have and enjoy ſeveral Offices, I ſhall therefore mention thoſe Laws by which this is required.

By the *Statute of* 25 *Car.* 2. *cap.* 2. *All Perſons as well Peers as others, who ſhall have any Office either Civil or Military, or who ſhall receive any Salary by Patent from the Queen, or have any command or place in Truſt under her, or ſhall be of the Houſhold, ſhall within three Months after their admittances in, or receiving their Authority or Employment, receive the Sacrament in ſome Publick Church upon ſome Sunday, and deliver a Certificate thereof the next Term after their admittance either in the Court of Queens Bench, or at the Quarter Seſſions where they reſide, under the hands of the Miniſter and Churchwardens, and prove it by credible Witneſſes upon Oath.*

The Perſons neglecting are diſabled to hold their Offices, and they are made void by the Act it ſelf; and if they execute the ſame afterwards upon a conviction either on an Information or Indictment in the Courts at Weſtminſter, or at the Aſſizes, they ſhall not be Plaintiffs in any Suit at Law or in Equity, or Guardians to a Child, or Executor or Adminiſtrator, or capable of a Legacy or Deed of

Gift

Gift, or bear any Office, and ſhall forfeit 500 l. *to the Proſecutor to be recovered by Action of Debt, Bill, Pleint or Information in the Courts at* Weſtminſter.

This *Statute* being ſo penal, the Miniſter is obliged by Law to Adminiſter the Sacrament in both kinds; but then by the Rubrick there muſt be three at leaſt to Communicate, and he muſt not without Lawful Cauſe deny it to any who ſhall devoutly and humbly deſire it.

But ſince there are ſome Lawful Cauſes of refuſal, therefore 'tis neceſſary that the Miniſter ſhould have convenient time to enquire whether the Perſons are fit to be partakers of this Ordinance, and for that purpoſe they are enjoined by the Rubrick to ſignifie their Names to the Curate at leaſt a day before 'tis Adminiſtred.

By the Canon (*a*) and Rubrick it appears what thoſe Lawful Cauſes are, *viz.* Thoſe who live in any known Sin without Repentance, thoſe who maliciouſly contend with their Neighbours ſhall not be admitted to the Communion before they are reconciled.

By another Canon (*b*) 'tis not to be Adminiſtred but to ſuch who Kneel, nor to any who refuſe to be preſent at the Prayers of the Church, and this under pain of Suſpenſion, nor to any who are depravers of the Common Prayer, or of any thing contained in the Articles of our Religion, unleſs they ſhall ſhew their Repentance, and promiſe before the Miniſter and Churchwardens either in writing or by word to do ſo no more.

So by the Rubrick none is to be admitted to the Sacrament till they are actually Confirmed or ready and deſirous ſo to be, nor if they have done any wrong to their Neighbours, ſo that the Congregation are offended at it, nor thoſe who live obſtinately in Malice or Hatred, nor to any * Stranger; for a Miniſter is not obliged to give it to any but to thoſe of his own Pariſh.

But if a Parſon will refuſe to Adminiſter the Sacrament without any juſt Cauſe, an Action on the Caſe lies againſt him, becauſe a Man may have a Temporal loſs by ſuch refuſal.

How often to be Adminiſtred.

In the next place I ſhall conſider how often in a Year the Pariſhioners are required to receive it.

The Primitive Chriſtians made it a conſtant part of their Worſhip every Week, ſo that it being a

(*a*) Canon 26. (*b*) Canon 27. * Canon 28.

cuſtomary

cuſtomary thing, ſome Perſons pretending to greater ſtrictneſs were of Opinion, that by frequent communicating, they did not receive it with that due Care and Reverence as they ought, but only in conformity to the Orders of the Church, and therefore they thought it better to abſtain for ſome time, that they might not come as Formaliſts, but with a due temper of Mind, and the better prepared to receive it, and ſo by degrees it came from a frequent and conſtant uſe to a total diſuſe.

The late Biſhop of *Worceſter* tells us, that our Reformers look'd on this diſuſe as a Corruption crept into the Church, and therefore they were of Opinion, that it ought once more to be brought up to the Primitive Practice, but that unreaſonable Scruples in ſome Perſons, and miſapprehenſions in others, and a general indifferency in matters of Religion had put a ſtop to the reviving this ancient part of Devotion.

However, they enjoined that it ſhould be received by all People three times in the Year, of which *Eaſter* was to be one; this is required by the *Rubrick* which is confirmed by Act of Parliament, and 'tis agreeable with ſome ancient Conſtitutions made for that very purpoſe.

We have ſome inſtances in our Books (*c*) of Proſecutions for not receiving the Sacrament, as *Anno* 17 *Car.*2. the Churchwardens preſented a Man for this neglect, and upon that Preſentment there was a Libel and he was Excommunicated in the Archdeacons Court, and tho' he ſuggeſted that he received it elſewhere tho' not in his own Pariſh, which he likewiſe pleaded in the Spiritual Court where they refuſed that Plea, yet the Courts at *Weſtminſter* would not grant a Prohibition, becauſe both the matter of the Libel and Plea were of Eccleſiaſtical Cognizance, and when they refuſed the Plea the Party ought to Appeal.

Where it is to be Adminiſtred.

It muſt be offered freely in the publick Church, and not in private Houſes; but if a ſick Perſon is not able to come to his Pariſh Church, he muſt acquaint the Curate with it, and that two more will communicate with him, and in ſuch caſe the *Rubrick* doth not prohibit but enjoins the Miniſter to give it in the ſick Man's Houſe.

This is likewiſe allowed by the *Canon* (*d*) where the Pariſhioner is impotent or not able to go to Church, or very dangerouſly Sick; but if adminiſtred in a private Houſe to a Perſon who is well and able to go to Church, in ſuch caſe

(*c*) Hardres 406. (*d*) Canon 71.

the

the Miniſter for the firſt Offence is to be Suſpended, and for the next he ſhall be Excommunicated.

And becauſe this ſolemn Ordinance (*e*) ſhould always be had in due Reverence the Law hath appointed, that he who depraves it or doth any thing in contempt of it ſhall be committed by three Juſtices of Peace, who are to take the Examination of two Witneſſes to prove the Fact on Oath, and bind them in the penalty of 5*l.* apiece to appear at the next Seſſions and give Evidence, and the Offender being found guilty is to be fined.

The Proſecution muſt be within three Months after the Offence.

Sacrilege.

THIS is the ſtealing ſomething out of a Publick and Sacred Place. It may be committed three ways as the Canoniſts tell us, that is, either in reſpect to Perſons, Places or Things.

Sacrilege againſt Perſons is the laying violent hands on thoſe who in a peculiar manner are ſet apart for the Worſhip and Service of God, this is accounted a Violation of their Privileges and Immunities, but I ſhall not treat of it in this Senſe, but only as it relates to places and things.

As to places, in this reſpect the Church in conſtruction of Law is the Manſion Houſe of God, and therefore 'tis Burglary to break it open *and enter it* in the Night time * with an into ſteal.

This ſeems to be the blackeſt Offence by which the Church is violated, and therefore it was puniſhed with the greateſt Severity.

Amongſt the Heathens all Offenders of this nature were put to Death, and they were not ſo much as allowed the common Humanity of Burial, and all their Goods were to be confiſcated.

But it was not puniſhed with Death upon the firſt introducing Chriſtianity here; for he who robbed the Church was to reſtore nine times the value of the things taken, and if not able to pay it, then he was to undergo a Corporal Puniſhment by Stripes.

'Tis true, one of our Hiſtorians mentions that King *Athelſtan* (*f*) cauſed ſome Thieves who had robbed St. *Edmunds* Church in *Suffolk* to be hanged; but in the ſame Book he tells

(*e*) 1 Ed. 6. cap. 1. * Dyer 99. (*f*) Malmſ. de geſtis pontificum, Lib. 1.

us

us they were held by ſome inviſible Power that they could not carry away what they had ſtoln.

This Monkiſh Whimſie may occaſion ſome Perſons to ſuſpect the truth of the whole Story, and the rather becauſe there were no Laws made in his time relating to Eccleſiaſtical Matters, but they were in moſt things only a Repetition or rather a Confirmation of ſuch which were made by his Grandfather King *Alfred*, in whoſe Reign the puniſhment of Sacrilege was only pecuniary, that is, the Offender was to reſtore the value of the thing taken, and was likewiſe to pay the value of his Head, which was about 40*l.* but it was an aggravation of the Fact to commit Sacrilege on a Sunday, for in ſuch caſe he was not only to pay the value of his Head, but his Hand with which he committed the Fact was to be cut off; but this he might redeem at the ſame price his Head was valued.

And many Years afterwards the puniſhment was by Excommunication, of which we have a remarkable inſtance, *An.* 38 *H.* 3. when the King himſelf ſtanding with his Hand on his Breaſt, and the whole Houſe of Peers with lighted Torches in their Hands, pronounced thoſe Perſons Excommunicated, who maliciouſly deprived the Church of their Right, *&c.* then they threw down their Torches extinguiſhed and ſmoaking, and all of them pronounced theſe words, *viz. So let thoſe who go againſt this Church be extinguiſhed in Hell.*

Our Anceſtors were ſo confident, that a Sacrilegious Perſon could not eſcape the Judgment of God, that they delivered him over to Satan, or as they uſually ſaid they curſed him with *Bell*, *Book* and *Candle*; that is, after the Curſe pronounced, which was done four times in a Year, they ſaid *fiat*, then they ſhut the Book, put out the Candle, and ringed the Bell.

But now if there is no actual Force, and Goods of the Church are taken from thence, in ſuch caſe the Churchwardens may have an Action at Common Law againſt the Offender, and ſhall recover Damages, or they may Libel in the Spiritual Court (*g*) againſt him *pro ſalute animæ*, which is the moſt proper remedy, and there he may recover the things *in Specie*.

Seats in the Church.

SINCE many Controverſies have happened concerning Seats.

(1.) In the Body of the Church.
(2.) In Iſles.
(3.) In Chancels.

(g) Sid. 281.

I ſhall now mention what the Law is as to theſe particulars.

(1.) As to Seats in the Body of the Church, the Freehold of the Soil is in the Incumbent, and the Seats are fixed to the Freehold; yet becauſe the Church it ſelf is Dedicated to the Service of God, and the Seats are Built that the People may more conveniently attend Divine Service, therefore where any contention is about a Seat in the Body of the Church, upon complaint made to the Ordinary, he may decide the controverſie by placing that Perſon in it who he thinks fit, and this power is conferred upon him by Law, becauſe he who hath the general Cure of Souls within his Dioceſs, is preſumed to have a due regard to the qualities of the contending Parties, and to give precedence to him who ought to have it.

But where there is no Contention, and the Ordinary doth not interpoſe becauſe there is no Complaint, there the Parſon and Churchwardens have power to place the Pariſhioners in Seats; and in ſome places the Churchwardens alone have that power by Cuſtom, as in *London*.

If a Seat is Built in the Body of the Church, without the conſent of the Biſhop, the Churchwardens may pull it down, becauſe it was ſet up by a private Perſon without the Licenſe of the Ordinary; but it hath been held, that if in removing ſuch Seat they cut the Timber or break it, (*a*) an Action of Treſpaſs lies againſt them.

This, like many other Caſes Reported by Mr. *Noy*, is not Law; for the Freehold of the Church being in the Incumbent, when the Perſon hath fixed a Seat to it, 'tis then become parcel of his Freehold, and conſequently the Right is in him, ſo that the breaking the Timber could not be prejudicial to the other, becauſe he had no legal Right to the Materials after they were fixed to the Freehold.

And becauſe Seats in the Body of the Church are to be diſpoſed by the Parſon and Churchwardens, (*b*) therefore it was formerly held that a Man cannot preſcribe for a Seat there; and yet he might preſcribe for the upper part of a (*c*) Seat there.

But now the Law is ſettled as to this Matter, *viz.* that one may preſcribe for a (*d*) Seat in the Body of the Church, ſetting forth that he is ſeized of an ancient Houſe, *&c.* and that he and all thoſe whoſe Eſtate he hath therein, have, time out of mind uſed, and had a Seat in the Body of the Church for themſelves and their Families, as belonging to the ſaid Houſe,

(*a*) Noy 108. (*b*) Moor 278, (*c*) Noy 78. Latch. 116. Palm. 424. (*d*) 12 Rep. 105. Noy 129, 130.

(*e*) and

(e) and that they repaired the ſaid Seat; and the reaſon why he muſt alledge that he repaired it is, becauſe the Freehold being in the Parſon, there muſt be ſome ſpecial Cauſe ſhewed for ſuch a Preſcription; but as to this matter the Court diſtinguiſhed between an Action on the Caſe brought againſt a (f) Diſturber, and a ſuggeſtion for a Prohibition; for in the firſt Caſe you need not alledge that you repair, becauſe the Action is brought againſt a wrong doer; but upon a ſuggeſtion for a prohibition it muſt be alledged that you repair, becauſe otherwiſe you ſhall not diveſt the Ordinary of that right which properly belongs to him.

If an Action on the Caſe is brought againſt the Diſturber, the Plaintiff will recover Damages if the Verdict is found for him; 'tis true, he may Libel in the Spiritual Court, and preſcribe there for a Seat, *&c.* but if the preſcription is denied a prohibition will be granted; if 'tis not denied then that Court may proceed to Sentence, which, if it happen to be againſt the preſcription, in ſuch Caſe alſo a prohibition will lie, becauſe the Suit being upon a preſcription, the proceedings in it were *coram non judice* in that Court, but this ſeems unreaſonable, (g) for it can be only to diſcharge the Perſon of the Coſts which he ought to pay.

Iſle of the Church. As to Seats in Iſles of Churches, the Law is, that if a Man hath a Houſe in a Pariſh, and a Seat in the Iſle of the Church which he hath repaired at his own Charge, he ſhall not be diſpoſſeſſed by the Biſhop; if he ſhould, he may have a Prohibition, (h) becauſe it ſhall be intended to be Built by his Anceſtors, with the conſent of Parſon, Patron and Ordinary, and appropriated by them to his and their uſe, and if he is diſturbed by any other Perſon in ſitting there, he may have an Action on the Caſe againſt him, but then he muſt prove that he repaired it, (i) and ſo it was adjudged between *Dawtree* and *Dee*, (k) for Seats in a little Chapel in the North part of the Chancel of *Petworth* in *Suſſex*, for tho' no Man can tell the true reaſon of Preſcriptions, yet ſome probable reaſon muſt be alledged to gain ſuch a peculiar right, and none is more probable than repairing it.

Chancel. As to the Chancel, the Ordinary hath no Authority to place any one there, for that is the Freehold of the Rector, and ſo is the Church; but he Repairs the one but not

(e) 2 Roll. Abr. 288. Hob. 69. Sid. 203. Raym. 52. (f) 1 Lev. 72. (g) Her. 94. (h) 12 Rep. 104. Godb. 200. 2 Cro. 366. (i) Sid. 89, 201. (k) 2 Cro. 604. Bridgm. 8. Palm. 46.

the

the other, and 'tis for this reaſon that an Impropriator hath the chief Seat in the Chancel.

But yet a Man may preſcribe to have a (*l*) Seat here, as belonging to an ancient Meſſuage.

Sequeſtration.

THIS is a ſeparating the thing in controverſie from the Poſſeſſion of the contending Parties; as for Inſtance, when a Spoliation is brought to try which of them is rightful Parſon 'tis uſual for the Judge at the Petition of either of them (ſetting forth that oppoſition may be made in collecting the Profits) to decree that they ſhall be Sequeſtred, and to order the Churchwardens to collect them, and this muſt be publiſhed in the Church, and they are to give Bond not only to collect but to keep the ſame for the uſe of him who ſhall be found to have the right, and to account to him, and the Judge uſually appoints ſome Miniſter to ſupply the Cure in the mean time, and appoints the Sequeſtrators to allow a certain reward to that Miniſter.

After the Suit is determined, the Sequeſtrators are to deliver the Profits which they have Collected to him who hath the right, and this they muſt do either in Specie or the Value, if Sold; if they refuſe they may be compelled by the Eccleſiaſtical Court, and if they delay to come to an account the Judge may aſſign the Bond to the Party grieved, with a Letter of Attorney to Sue for the Penalty.

But Sequeſtrations may be made in ſeveral other Caſes, as for not repairing the Church or Parſonage Houſe, if the Incumbent neglects, being once admoniſhed to do it, then ſome part of the profits of his Living may be Sequeſtred for that purpoſe; but it hath been a Queſtion whether the Tithes of an Impropriator may be Sequeſtred to repair the Chancel; 'tis certain they might whilſt they were in the Hands of the Monks, but being now made a Lay-Fee by a particular Act of Parliament, the Spiritual Court hath no Juriſdiction in that matter, but the uſual courſe in ſuch caſes is by Citation, and in caſe of Contumacy to proceed to Excommunication.

Sometimes a Benefice is Sequeſtred by virtue of ſome Proceſs out of the Courts at *Weſtminſter*, and this is where a Judgment is obtained againſt a Clergy-man, and upon a *Scire Facias* directed to the Sheriff to Levy the Debt and Damages, he returns, that the Defendant is *Clericus beneficiatus non habens Lai-*

(*l*) Noy 173.

cum

cum feodum in balliva mea, then another *Fieri Facias* is directed to the Biſhop to Levy the ſame *de bonis Eccleſiaſticis*, and by virtue thereof the Tithes will be Sequeſtred.

But the moſt uſual occaſion of a Sequeſtration is, upon the Vacancy of a Benefice, for during that time the profits of the Church are in Abeyance, and are therefore to be received by the Churchwardens, by the appointment of the Biſhop, under the Seal of the Court, and this is to provide for the Cure during the Vacancy.

But they cannot bring an Action in their own name for the Tithes, therefore the proper remedy to recover them is by Libel in the Spiritual Court.

Sideſmen.

IT was uſual for Biſhops in their Viſitations, to Summon ſome credible Perſons out of every Pariſh, whom they examined on Oath concerning the condition of the Church, and other Affairs relating to it.

Afterwards theſe Perſons became ſtanding Officers in ſeveral places, eſpecially in great Cities, and when Perſonal Viſitations were a little Diſuſed, and when it became a cuſtom for the Pariſhioners to repair the Body of the Church, which began about the 15th Century, theſe Officers were ſtill more neceſſary, and then they were called *Teſtes Synodales* or *juratores Synodi*, ſome called them Synods-men, and now they are corruptly called Sideſmen.

They are choſen every Year according to the cuſtom of the Place, and their buſineſs is to aſſiſt the Churchwardens in enquiring into things relating to the Church, and making Preſentments of ſuch matters which are puniſhable by the Eccleſiaſtical Laws.

Symony.

THIS is a name of a Reproach which the Canoniſts have fixed on all Contracts and Agreements for Gain, in diſpoſing or obtaining any Benefice or Eccleſiaſtical promotion.

1 Barons ab. 400.

The Schoolmen, and my Lord *Coke* from them, derive the word from *Symon Magus*, but I cannot imagine for what reaſon, unleſs every thing of a Spiritual Nature may be called the immediate Gift of the Holy Ghoſt, for that was what he deſigned to purchaſe.

I know the Biſhop of *Worceſter*'s opinion was, that the right of diſcharging a Spiritual Truſt, and the right of enjoying the Profits which are ſet a-part for ſuch a Spiritual uſe, do always go together; but can any one infer from thence, that he who purchaſeth thoſe Temporal Profits, doth therefore purchaſe that Spiritual Truſt, and ſo reſemble it to the Caſe of *Simon Magus*.

His Sins were Hypocriſie and Ambition; for being a Sorcerer himſelf, and having done ſome wonderful things in *Samaria*, by the help of the Devil, he plainly ſaw, that in Converting the People of that City from Heatheniſm, God gave more power to *Philip* than the Devil gave to him, and therefore he believed and was Baptized, not for any Zeal which he had for Religion, but meerly out of an Hypocritical deſign to be admitted into the Church, that he might be entituled to that Power which was given to the Apoſtles; for having ſeen what extraordinary Gifts were conferred by them, only by impoſition of their Hands on thoſe who were deſigned for the Miniſtry, he deſired to purchaſe the like power, that is, to conſer the immediate Gifts of the Holy Ghoſt on whom he ſhould lay his Hands; not that he intended the glory of God by it, but that he might be in greater eſteem amongſt the People than whilſt he was a Sorcerer.

Hildebrand, who was the worſt Pope, made a ſevere Decree againſt Offenders of this nature, *viz.* That both the Buyers and Sellers of any Eccleſiaſtical Livings, and all thoſe conſenting to it, ſhould be Damned, with *Simon Magus*.

Pope *Gelaſius* was not altogether ſo ſevere, for he allowed the Offender to Repent, but if he would not, then he was to be *anathematis mucrone perfoſſus*.

The Churchmen in thoſe days did not only make Canons againſt Simony, but ſtrange and ridiculous Stories were invented to frighten Men from it; ſuch was that Story of a Clergyman, who gave the Emperor's Son a Silver Pipe to make him a Biſhop when he ſhould be Emperor himſelf, which he did; but being ſoon afterwards afflicted with Sickneſs, there was a Faſt appointed for three days together for the recovery of his Health; but the poor Emperor was all that while amongſt the Devils, who Darted Flames into his Mouth thro' a Pipe; but being Recovered he Degraded the Biſhop whom he had promoted by Simony; and this puniſhment, with his Repentance, was an atonement for that Offence.

I muſt confeſs, as a Silver Whiſtle was only a Bribe for a Child, ſo the Story is fit to be impoſed on no other.

Under this Title I ſhall Treat of three things:

(1.) What Simony was before the Statute, and what Contracts amount to it ſince.

(2.) The puniſhment of the Patron.

(3.) The puniſhment of the Clerk thus preſented.

As to the firſt of theſe Particulars the Canoniſts tell us, that every Agreement relating to Buying or Selling Benefices, is *turpe Lucrum*, which brings *turpe Commercium* into the Church. That ſuch Contracts have been condemned by ſeveral Councils, and ſevere Canons have been made both againſt the Patron and his Clerk; that Simony is *voluntas ſive deſiderium emendi vel vendendi ſpiritualia vel ſpiritualibus adhærentia*, but certainly this is contrary to our Law; for mental Simony is not puniſhable either by the Common or Statute Law, it muſt be real Simony, either by actual payment of Money, or a contract to Pay it.

Now *quilibet contractus ex turpi cauſa* is odious in the ſight of the Law; and tho' Simony is ſuch a (*a*) Contract, yet it was not void for that reaſon, before the Statute 31 *Eliz.* tho' 'tis ſince.

Neither my Lord *Coke* or *Hobert* mention what Simony was at Common Law; one ſays 'tis *vox Eccleſiaſtica*, and in *Mackaller* and *Todericks* Caſe (*b*) it was objected, that the Common Law did not take any notice of it, for that was a meer Eccleſiaſtical Offence; but Juſtice *Croke* who Reports this Caſe tells us, this was denied by the Court; 'tis Reported likewiſe by Juſtice *Jones*, but he is ſilent as to this particular.

And becauſe the Common Lawyers have not yet declared what Simony is, therefore a Learned Prelate was of opinion, that the Canon Law, notwithſtanding the Statute, muſt ſtill be the Rule and Meaſure by which Simony is to be determined, and the rather, becauſe he tells us, 'tis not ſo much as mentioned in the (*c*) Statute, for if it had, the Judges of the Common Law (*d*) would then have ſufficient reaſon to declare what it is.

One would imagine that this great Prelate took this Obſervation from Mr. Attorney *Noy*, (*e*) who affirms the ſame thing in his Report of *Winchcomb's* Caſe.

But the word Simony is not only mentioned in the Statute, but 'tis there explained what is meant by it, *viz. That 'tis a Corruption in Preſentations, Collations and Donations, of and to Benefices*, (*f*) which laſt Paragraph that Biſhop himſelf in another place confeſſes to be an explanation what Simony is;

(*a*) 3 Inſt. 153. (*b*) Cro. Car. 361. (*c*) Eccleſ. Caſes, 379, 393, 394. (*d*) Idem 293. (*e*) Noy 25. (*f*) Eccleſ. Caſes 59.

and

and yet he would have the Canon Law to be the Rule to determine it.

I admit it was ſo before the making this Statute, and that it was then a meer Spiritual Offence, of which the Common Law took no notice in the abſtracted notion and ſenſe of the word; and ſo it was held by the whole Court of Common Pleas about 9 Years after the making this (*g*) Statute, *viz.* That Simony was not againſt our Law, nor any Bond or Contract relating to it, made void by any Statute; and *Anno* 12 *Eliz.* (*h*) in the ſame Court it was held, that it belongs to the Spiritual Court to determin it, and not to the Courts at *Weſtminſter*.

But the force of thoſe ancient Canons was almoſt worn out by time, and even when they were put in Execution, both the Patron and Incumbent often eſcaped unpuniſhed; for the right of the Patron could not be taken away by a Canon, and the Incumbent was to hold the Living till he was deprived by a Judicial Sentence in the Spiritual Court, which was not very often obtained, becauſe ſuch proof was wanting which the Eccleſiaſtical Law required, therefore it was thought neceſſary *Anno* 31 *Eliz. cap.* 6. to make a Statute againſt Simony.

If any Perſon do preſent or collate to a Benefice with Cure, for any reward or aſſurance, or give or beſtow any Eccleſiaſtical Living for any corrupt conſideration, ſuch Preſentation, &c. *and every Admiſſion,* &c. *thereon ſhall be Void, and the Queen may preſent to the ſame for one turn.*

This laſt Clauſe was very neceſſary to puniſh the Patron in the loſs of his Preſentation; for before the making this Statute the puniſhment was chiefly inflicted on the Clerk, and the Patron eſcaped, for he might preſent another.

But now he is not only to loſe his Preſentation *pro hac vice*, but he is to forfeit double the Value of the Living, according to the utmoſt Value, and this he forfeits upon a corrupt Contract only, tho' the Clerk is not preſented; but the Queen is not to have the Preſentation unleſs the Clerk is actually preſented: And in ſuch Caſe if he dies Incumbent the Queen ſhall not loſe Her Preſentation, becauſe it was Void, and the Church was never full of him.

The words of the Statute which relate to this matter are, *viz. He who gives or takes ſuch Reward or Aſſurance, forfeits double the* * *Value of One Years Spiritual Promotion; and the Perſon*

(*g*) Moor 564. (*h*) Cro. Eliz. 789. Moor 914. * To be divided between the Queen and Proſecutor, upon Conviction on an Information.

corruptly taking ſuch Promotion ſhall be diſabled to enjoy the ſame.

This Clauſe takes in both the Patron and Incumbent; but before I ſhall treat of it in particular, I will mention how the Law ſtood in relation to a corrupt Patron before the making this Statute, *viz.* Such Patron was to be Excommunicated, and to loſe the right of Patronage for ever; this was enjoyned by the Canon, but never attempted to be put in Execution, for if it had the Courts at *Weſtminſter* would have granted Prohibitions, becauſe they would never ſuffer a Canon not confirmed by Act of Parliament, or not generally received here, to determine a right to any Freehold.

I know the Spiritual Courts mince the matter, by telling us they do not determine any ſuch Right, for they meddle only with the manner of obtaining the Preſentation, which is very true; but if that proves to be Simonaical, the Admiſſion and Inſtitution is Void, which by conſequence diveſts the Perſon of his Freehold, or rather the Incumbent hath no Freehold there, becauſe the Statute hath made the Church Void, ſo that he cannot properly be ſaid to be deprived of that which he never had.

Of Simony ſince the Statute.] Since the making this Statute, the following Contracts have been adjudged to be Simony.

If a Father purchaſes the next Avoidance in the preſence of his Son, the Incumbent being then Sick, and ſoon afterwards Dying, and then the Father preſents his Son, this is Simony, as Sir *Simon Degg* tells us from Serjeant *Moor*; (*i*) but Juſtice *Croke*, who Reports the ſame Caſe, informs us, that none was of that opinion; but *Anderſon*, for the Father, is bound by Nature to provide for his Son, and that the buying the next Avoidance with an intention to preſent him, was not Simony, tho' the Son was privy to it, becauſe it was no Offence in the Father, and by conſequence could be none in the Son.

There have been ſome Remarks made on this Judgment, and with ſome colour of Reaſon, *viz.* That if 'tis Simony in a Friend to buy the next Avoidance when the Incumbent is Sick, and in the preſence of him whom he deſigns to preſent, and afterwards preſents him accordingly, it muſt be ſo in the Father who buys it in the preſence of his Son; for the Statute doth not diſtinguiſh between Perſons, and the reaſon given to ſopport that Judgment fails in this reſpect, for a Man is bound by Nature to provide for himſelf as well as for his Son; but no Man will deny it to be Simony to purchaſe ſo for himſelf:

(*k*) Moor 916; Cro. Eliz. 268; Owen 87.

Beſides,

Beſides, if the Proviſion for a Son ſhould be a reaſon to purchaſe the next Avoidance in his preſence when the Incumbent is dying, the ſame reaſon would continue after he is dead as well as when the Church was full of a ſickly Perſon, for the Father is as much bound by Nature to provide for his Son then, as he was before; and yet it muſt be agreed, that notwithſtanding that natural Obligation, if he purchaſe for his Son after the Church is void 'tis Simony.

In *Booth* and *Potter*'s Caſe, (*k*) the Father made the corrupt Agreement, and the Son was not privy to it, yet he was held to be a Perſon *diſabled* by this *Statute* to accept that Benefice; this was the Caſe Sir *Simon Degg* (*l*) tells us he had ſeen; and my Lord *Coke* himſelf in another Caſe affirmed the Law to be ſo.

'Tis true, the Simony of the Father was clearly proved in that Caſe, and it doth not appear but that the Son was privy to it, for the Reporter tells us, that it was *alledged* that he did know it, and that might be the reaſon why he was adjudged to be a Perſon diſabled.

But there was ſomething extraordinary in that Caſe; for after the Simony of the Father was proved, and the King's Preſentee was admitted, the Father procured him to be deprived, but before the Deprivation he obtained a Grant of the next Avoidance to a Friend, who ſoon after the Deprivation preſented the Son again, and thereupon he brought his Ejectment, but the Law was held to be againſt him, for he muſt neceſſarily be privy to the Simony of his Father; becauſe the King's Preſentee was admitted upon it, therefore it ſeems plain, that he took the Benefice upon a corrupt Contract, which is expreſly prohibited by the *Statute*.

The words are, *viz. The Perſon corruptly taking a Promotion ſhall be diſabled to enjoy the ſame:* Now this Clauſe being ſo very penal on the corrupt Taker, it hath been a Queſtion whether a Perſon can be ſaid to take a Benefice corruptly, who is admitted to it upon a corrupt Preſentation, to which he was not privy or conſenting.

We have my Lord *Coke*'s (*m*) Opinion, that ſuch Perſon is not diſabled by the *Statute*, but he tells us the Living is void, and if the Queen, whoſe turn it is, will then preſent him 'tis good, and he ſhall enjoy that very Benefice, and *Buttler* and *Baker*'s Caſe is cited in the Margent of the 3d *Inſtitutes* to prove it.

(*k*) 2 Cro. 533. (*l*) 2 Cro. 385. 3 Bulſt. 92. (*m*) 3 Inſt. 154.

The Caſe is Reported by Juſtice *Croke* (*n*) and Serjeant *Moor*, in which it appeared that the Incumbent did not know the corrupt Agreement till after he was inducted, and yet it was held that he was diſabled to enjoy that Living which is contrary to my Lord *Coke*'s Opinion.

But certainly it muſt be a miſtake in *Booth* and *Potter*'s Caſe to ſay, that the Perſon not privy to a corrupt Agreement is diſabled by the expreſs words of the *Statute*, 'tis the Preſentation which is void, (*o*) but a Man can never be ſaid to be corruptly taking who is not privy to the corrupt Agreement; ſo that tho' he looſes his Incumbency upon ſuch a Preſentation, yet he is not ſo diſabled but he may be preſented again to the ſame Benefice.

But there may be a Simonaical Promotion where neither the Patron or the Clerk are privy to it; as if a Friend of the one give Money to a Relation of the other to procure him to preſent that Clerk, in ſuch caſe the right of Preſentation will be veſted in the Queen *pro hac vice*, (*p*) and an Incumbent who came in under ſuch a Title enjoyed the Benefice above twenty Years.

'Tis true, Juſtice *Windham* was againſt that Judgment, becauſe the Patrons Right might be defeated by colluſion between two Strangers, which he held to be very unreaſonable.

If the Clerk himſelf had contracted with the Patron for the next Preſentation when the Incumbent was ſick, (*a*) and for that purpoſe that it ſhould be granted to a Friend, who upon the death of the Incumbent preſented that very Perſon, this is Simony.

So if a Stranger or Relation of any Clergy-man during the ſickneſs of the Incumbent agrees with the Grantee of the *next Avoidance* to preſent him, and accordingly he is preſented, this is Simony, tho' the Clerk is not privy to the Agreement, *a fortiori* where he is a Party and knows the corrupt Contract.

If pending a *Quare Impedit* (*b*) the Plaintiff ſells the *Advowſon ea intentione*, that ſuch a Clerk ſhould be preſented after the Incumbent ſhould be removed, who was afterward preſented, this is Simony.

If a Stranger purchaſeth the *next Avoidance* (*c*) when the Incumbent is Sick, and then after his Death preſents a Clerk who was not privy to the Contract, but acquainted with it afterwards, this likewiſe is Simony.

(*n*) Cro. Eliz 788. Moor 913. (*o*) 12 Rep. 100. Lane 37. (*p*) Sid. 329.
(*a*) Hob. 165. Cro. Eliz. 686. (*b*) 2 Vent. 39. (*c*) Moor 916.

And

And generally any Covenant or Agreement made under any manner of Conſideration whatſoever, to preſent a Perſon is Simonaical; (*d*) but if a Father, upon the Marriage of his Daughter, Covenants to pay a Portion, *&c.* and there is a diſtinct Covenant that he will procure the Son in Law to be admitted to ſuch a Benefice upon the next Avoidance, this ſhall not be intended to be Simonaical becauſe the Covenant had no dependance upon the Marriage, it was an entire Covenant by its ſelf, and not made in conſideration of Marriage, for if it had, then it would have been Simony, but it may be made ſo by a Special Averment, ſhewing that it was Simonaical.

So a promiſe to give Money (*e*) in conſideration, the Plaintiff would endeavour to procure the Perſon to be Rector of ſuch a Church is Simonaical.

If the Patron takes a Bond of the Clerk (*f*) to pay ſo much Money every Year towards the maintenance of the laſt Incumbent's Son at the Univerſity, and whilſt he is unpreferred, or to his Widow, this is not Simony. 'Tis true, Sir *Simon Degg* directs his Reader *quærere rationem*, but he has given a very good reaſon for it himſelf, for he ſays theſe are charitable Reſolutions.

If the next Preſentation is granted to a Clergy-man (*g*) who gives Bond to pay Money for it when the Church becomes void 'tis Simony.

If the Clerk gives a Bond to pay (*h*) 100 *l. per Annum* to the Patron, and an Action of Debt is brought upon this Bond, and the Defendant exhibits a Bill in Equity to be relieved, ſetting forth that the Bond was given upon a Simonaical Agreement, after the Defendant had anſwered this Bill was admitted as Evidence to prove the Simony.

If a Clerk agrees with a Stranger (*i*) to procure the Grantee of the next Avoidance to ſurrender to another, and to influence the Surrendree to preſent him when the Church is void, which was afterwards done, this alſo is Simony.

By this Statute the Perſon who *Admits*, *Inſtitutes* or *Inducts* a Clergy-man for any Reward or Aſſurance forfeits double the value of one Years Profits of the Living, and the Admiſſion and Inſtitution is void, and the true Patron may preſent again, but no Lapſe ſhall incur upon ſuch Avoidance till ſix Months after notice given by the Ordinary to the Patron.

(*d*) Cro. Car. 425. (*e*) Jones 341. (*f*) Noy 142. (*g*) March, 158. (*h*) Sid. 221. (*i*) 2 Brownl. 7.

And by the ſame *Statute* an Incumbent on a Benefice with Cure, *corruptly Reſigning or Exchanging*, or who ſhall take any thing to Reſign or Exchange, both the Giver and Taker looſes double one Years value of the Benefice.

As to that Paragraph concerning *Admiſſions* for any Reward, Sir *Edward Coke* (*k*) tells us, he was a Member of that Parliament wherein this Act was made, and that the Clauſe was inſerted to prevent haſty Admiſſions to the prejudice of the Patron by putting him to recover his Right by Law.

But now if any Reward is taken more then the uſual Fee for Admiſſions, the Church ſhall be void as to the Patron without any Sentence of Deprivation, and he may preſent the ſame Clerk again, for the Clauſe doth not bring any diſability upon him, nor is he bound to ſtay till the Clerk is deprived by a judicial Sentence.

As to the other Paragraph concerning *corruptly Exchanging*, &c. Sir *Simon Degg* gives this inſtance, *viz.* If two Clergymen agree to exchange Livings, and one promiſeth his Patron that if he will preſent the other, he ſhould demiſe the Tithes to him at ſuch a Rent, this is Simony if the Leaſe is afterwards made purſuant to that Agreement, tho' the Leſſor was not privy to it when it was made.

I ſhall only mention, that long before this Act was made, *viz. Anno 6 Ed. 6.* there was another paſſed both Houſes againſt Simony, and particularly againſt granting preſentations whilſt the Incumbent was yet alive, but it never paſſed the Royal Aſſent: If ſuch a Clauſe had been inſerted in the Act 31 *Eliz.* it might have prevented many Simonaical Contracts which have ſince happened.

And as all corrupt *exchanging* Benefices, ſo likewiſe all corrupt *Reſignations* are prohibited by this *Statute*.

'Tis true, in an Action of Debt on a Bond (*l*) the Defendant pleaded, that the Money was paid for the Reſignation of a Church to the intent that another might be preſented, and averred that both the Clerk and Patron who were Parties to the Bond were likewiſe Parties to the Agreement, yet the Bond was held good, becauſe Simony was not an Offence at Common Law, nor any Contract or Bond made void by the *Statute*; and that the Defendant ought not to aver that the Money was to be paid for any other Cauſe than what was expreſſed in the Obligation.

Upon the whole matter, a Preſentation upon a Simonaical Agreement is void as to all manner of Perſons who have any intereſt in the Benefice.

(*k*) 3 Inſt. 155. (*l*) Moor. 964.

'Tis

'Tis void as to the Patron who is to looſe his Right of Patronage *pro hac vice*, for that is veſted in the Queen, and ſhe may preſent without any Sentence of Deprivation.

'Tis void as to the Ordinary, for he is bound to admit the Queen's Preſentee, and no Lapſe can incur where the right of Preſentation is veſted in her; but if the Patron was not privy to the Simony, and the Clerk is only *Simonaicus*, there the Ordinary cannot collate by Lapſe till after ſix Months *notice* given to the Patron.

'Tis void as to the Clerk without a Declaratory Sentence, tho' he was not privy to it, for he was *Simonaice Promotus*, tho' he was not *Simonaicus* himſelf, and in ſuch caſe he is diſabled to hold the Benefice which was gotten by that means; but if he had been privy to the * Simony then he is made for ever incapable to hold any Spiritual Promotion; and tho' the Queen ſhould preſent him to the ſame Benefice with a *non obſtante* to the Simony, or if ſhe pardon it, yet he can have no Title becauſe ſhe cannot enable him whom an Act of Parliament hath diſabled, and the Pardon only diſcharges the Puniſhment as to the Forfeiture of the double value, and can never enure to ſettle him in a Benefice which was not full of him by reaſon of the Simony.

'Tis void alſo as to the Pariſhioners, for if the Parſon ſues for Tithes, they may plead that he is not Incumbent, for he hath no right to the Profits from the time the Church became void, nor at any other time; but all thoſe are due to the Clerk whom the Queen ſhall preſent even from the time of the Avoidance, becauſe the ſucceeding Clerk being inducted upon a Simonaical Preſentation the Church was never full of him, but it ſtill remained void by vertue of this *Statute*.

And if the Queen ſhould not preſent during the life of the Simonaick, but he dies Incumbent, and then the true Patron Preſents; his Clerk thus preſented and admitted will be entituled to all the Profits ſince the laſt Avoidance by the death of the legal Incumbent.

Before the *Statute* of *W.* 1. *cap.* 16. the Queen might remove the Patron's Clerk, and in ſuch caſe her Preſentee could claim only the Profits from his Inſtitution; but now ſince this *Statute* of 31 *Eliz.* if the Perſon who was promoted by Simony ſhould die Incumbent, his Offence ſhall not be prejudicial either to a Patron who was not privy to it, or to his Clerk upon pretence of a Lapſe or otherwiſe howſoever, unleſs the

* 1 Rol. Rep. 237.

Patron

Patron or the Clerk were convicted of Simony in the life time of ſuch Incumbent.

And by the ſame *Statute* Leaſes made *Bona fide* by a Perſon who came in by Simony to any Leſſee for a valuable Conſideration, and who is not privy to it or had any notice thereof ſhall not be avoided.

'Tis to be obſerved, that where a Patron preſents who is not privy to the Simony of his Clerk, he need not be named in the *Quare Impedit*, (*m*) as for inſtance, if the Clerk contracts with a Friend or Relation of the Grantee of the next Avoidance, and thereupon gets the Preſentation, the Queen may Declare againſt the Ordinary and the Incumbent, for the Patron's Title is not in Queſtion, he had the benefit of his Preſentation; 'tis the Clerk who is the Offender, and he ought to be removed.

I ſhall conclude this Title with the Oath againſt Simony, *viz. I* P. S. *do Swear that I have made no Simonaical Payment, Contract, or Promiſe, directly or indirectly by my ſelf, or by any other to my Knowledge, or with my conſent to any Perſon whatſoever for or concerning the procuring or obtaining the Rectory of* H. *in the Dioceſs of* C. *nor will at any time hereafter perform or ſatisfie any ſuch kind of Payment, Contract, or Promiſe made by any other without my Knowledge or Conſent*, ſo help me God, *&c.*

The late Biſhop of *Worceſter* was of Opinion that this Oath hath no relation to the *Statute* 31 *Eliz.* becauſe it was in being before that Act was made, and therefore that a Simonaical Contract ought to be interpreted by the Eccleſiaſtical Law.

This deſerves no other anſwer than what he hath given himſelf in another place, where he tells us, that if the word Simony had been in the *Statute*, the Judges might interpret what it was, for they are the Expoſitors of our Laws, and ſince 'tis plainly to be ſeen in that Act, therefore the Courts at *Weſtminſter* may determine what Simony is, and what Contracts will amount to it.

Suffragans.

THE word properly ſignifies all the Provincial Biſhops which are under a Metropolitan, and they are called his Suffragans, becauſe he had power to call them to his Provincial Synods to give their Suffrages there.

(*m*) 3 Lev. 16.

The

The *Chorepiſcopi* had been long ſet aſide, who had been for many Ages rural Biſhops, of which I ſhall give this ſhort account.

The Biſhop who was the Supreme of the whole Dioceſs in Eccleſiaſtical Affairs, did generally reſide in the City with his Presbyters, and when diſabled by old Age or any other Infirmity to inſpect and govern the Church, he uſually choſe a Coadjutor to aſſiſt him, and this Perſon often ſucceeded him in the Biſhoprick.

Afterwards when Chriſtianity ſpread it ſelf into many Towns and Villages at a great diſtance from the City, and the number of the converted Heathens daily encreaſed, it was thought fit to chooſe another Aſſiſtant, who was called *Chorepiſcopus* or a country Biſhop, as the word it ſelf imports, who was really a Biſhop in Order and not a meer Presbyter.

Tis true, he was inferiour to the City Biſhop, and therefore his Ordination by one Biſhop alone was valid; but ſtill he was a Biſhop, and his Office was to enquire into the Behaviour and Morals of the Country Clergy, and to ſee that no Perſons but ſuch who were duly qualified ſhould be let into the Miniſtry.

They had Power to Confirm in Country Churches, and to ſit and Vote in Councils in their own Names; they might Ordain Readers and Sub-Deacons, but not Presbyters and Deacons without the Biſhop's Licenſe.

But by the Council of *Laodecea* their Power was diminiſhed; for it was decreed by that Council, that Biſhops ſhould not be in Country Villages, but viſiting Presbyters ſhould be in their room.

However their Power was not ſuppreſſed at once, it did ſink by degrees, and afterwards in the ninth Century it came to nothing; and then it was pretended they were not Biſhops but Presbyters, and ſo the whole Order was ſet aſide in the Weſtern Church.

In the very beginning of the Reformation here, *viz. Anno 26 H. 8. cap.* 14. an Act paſſed to reſtore this Order of Men under the name of Suffragan Biſhops; the Preamble recites, that good Laws had been made for electing and conſecrating Archbiſhops and Biſhops, but no Proviſion was made for *Suffragans* which had been accuſtomed here for the more ſpeedy Adminiſtration of the Sacraments, and other devout things, *&c.* therefore it was enacted that the places following ſhould be the Sees of Biſhops Suffragans.

Bedford

Bedford, Berwick, Bridgwater, Briſtol, Cambridge, Colcheſter, Dover, St. *German, Gilford, Glouceſter, Grantham, Hull, Huntingdon, Iſle of Wight, Ipſwich, Leiceſter, Marlborough, Moulton, Nottingham, Penrith, Southampton, Shaftsbury, Shrewsbury, Taunton, Thetford.*

That the Biſhip of each Dioceſs ſhall by petition preſent two Perſons to the King, whereof he ſhall allow one to be the Suffragan, and thereupon direct his Mandate to the Archbiſhop to conſecrate him, which was to be done after this manner; Firſt it recites that the Biſhop having informed the King that he wanted a Suffragan, had therefore preſented two Perſons to him who were qualified for that Office, praying that the King would nominate one of them, thereupon he nominated *P. S.* being one of the Perſons preſented, to be Suffragan of the See of *Ipſwich*, requiring the Archbiſhop to Conſecrate him.

The Biſhop thus Conſecrated was to have no greater Authority than what was limited to him by Commiſſion from the Biſhop of the Dioceſs, and was to laſt no longer.

'Tis true, this Act was repealed by 1 & 2 *Phil. Mar. cap.* 8. but it was revived by 1 *Eliz.* 1. tho' never put in practice ſince that time.

Sine Cure.

THESE are Benefices preſentable, but becauſe Vicaridges are endowed in the ſame places the Perſons who enjoy thoſe Sine Cures, have by long Cuſtom been excuſed from Reſidence, which is the moſt can be ſaid for them.

This was the Opinion of the late Biſhop of *Worceſter*, but it needs ſome explanation.

Generally wherever there is a Sine Cure there muſt be two Incumbents, the one is a Rector the other a Vicar, and they are both equally Inſtituted *ad curam animarum*, the one *Habitualiter*, the other *Actualiter*, that is, the Rectors are not obliged either to Duty or Reſidence, but the whole Cure of the Pariſh is by Cuſtom devolved on the Vicar, ſo that the Rectories of ſuch Pariſhes are thoſe which are commonly called Sine Cures.

And as theſe Cures are preſentable, ſo they muſt be reſigned to the Ordinary, and whatever hath been alledged relating to other Benefices is applicable to them; only if ſuch Rectories are Donative as ſome of them are, they may be more properly called Sine Cures then when the Incumbent comes in by Inſtitution; for notwithſtanding the diſtinction above-

mentioned

mentioned, I cannot ſee how a Man who is really Inſtituted *ad curam animarum*, and hath taken upon him that Cure, can be ſaid to have it only *habitualiter*, ſo as to make his Benefice a Sine Cure.

Sinods and Sinodals.

THIS is a meeting of Eccleſiaſtical Perſons for the cauſes of Religion; and it comprehends the Provincial Sinods of every Metropolitan, and the Dioceſan of every Biſhop within their Limits.

And theſe are not of that Authority as General Councils, nor do their Canons oblige the whole Chriſtian Church, but only that Nation were they were made; but if ſuch Canons are agreeable with the Scriptures, and confirmed by General Councils, they are in force every where.

I ſhall not make a large Diſcourſe of theſe Aſſemblies, becauſe they are now almoſt diſuſed, and therefore ſhall only acquaint the Reader that the moſt famous Councils have been held at *Africa*, *Britain*, *France*, *Germany*, *Italy* *Spain*.

It would make a very large Volume to treat particularly of thoſe Sinods which have been held in each of thoſe Places, therefore I ſhall confine my ſelf to thoſe which were Aſſembled here in *Britain*, and as to that matter, I find that a Sinod was held here at *Wincheſter*, in the time of King *Edgar*, in which Archbiſhop *Dunſtan* was Preſident; and the Monkiſh Hiſtorians of that Sinod tells us, that a Wooden Croſs did then Speak againſt the Marriage of Prieſts, which probably might have a greater effect upon them againſt that ſtate of Life, in thoſe credulous and ſuperſtitious times, than all the Wooden Arguments that Archbiſhop or any of his Chaplains could bring againſt it.

There was another held at *Oxford*, wherein Archbiſhop *Langton* was Preſident, who divided the Bible into Chapters; and in this Sinod many Conſtitutions were made for the better Government of the Church.

Another at *Clarendon* under Archbiſhop *Becket*, in the Reign of *Hen.* 2. in which ſome Decrees were made concerning the Prerogatives of the Crown and the Privileges of the Clergy:

Two in the Reign of *Edw.* 6. In the one the 39 Articles were Confirmed; and in the other the *Engliſh* Liturgy was Compoſed by Seven Biſhops, and Four Doctors of Divinity.

And here I cannot but take notice that Provincial Sinods were to be held twice in every Year; this appears by the Apoſtolical Canons, and likewiſe by thoſe made in the Council of *Nice*.

But

But this being found too hard a Task for Biſhops, who were uſually Men in Years, eſpecially where the Provinces were large, it was diſuſed about the middle of the 5th Century; ſo that ſome Canons were made for Synods to be held once in a Year, but not abrogating the ancient Cuſtom to hold them oftner, and this continued for many Ages, but at laſt this came in like manner to be neglected, and thereupon, about the middle of the 14th Century another Canon was made in the Council of *Baſil*, for a Triennial Sinod of all the Biſhops of every Province; and in the ſame Council there was another Canon for every Biſhop to hold a Dioceſan Synod once in a Year.

And even here in *Britain*, by the ancient conſtitution of this Church, a Sinod was to beheld once in a Year, which is now diſcontinued, and thus the Authority of examining things thro' the Province, devolved on the Archbiſhop.

In a Dioceſan Synod the Biſhop always preſided, and he uſually Summoned *Septem a plebe* in every Pariſh in his Dioceſs, to whom he adminiſtred an Oath to enquire into the ſtate and condition of each Pariſh relating to Eccleſiaſtical Affairs, which were called *Teſtes Synodales*, and theſe Men made their preſentments in Writing, or *viva Voce* in the Sinod.

And at theſe meetings there was a pecuniary Tribute paid by the inferior Clergy to the Biſhop, which is called a Synodal, becauſe it was uſually paid at thoſe Sinods, but not always; for it was paid likewiſe at *Chriſtmas* and *Eaſter*, and ſometimes at the Biſhops Viſitations; and it differs from Procurations, for thoſe are Penſions, but Sinodals are Cenſus or Tributes.

This Tribute was afterwards demanded by Archdeacons and Deans, not *jure Communi Eccleſiaſtico*, but by compoſition between the Biſhop and them; and ſince Sinods have been diſcontinued, this Tribute is uſually paid to them at Viſitations, and claimed by Archdeacons for their *Eaſter* Viſitations, it ſeems to be a Contribution towards their Charges in Sinods, for they were Elected by the Deacons, and were their Repreſentatives at ſuch Aſſemblies.

'Tis now become a Church Due, of which the Act of 34 *H.* 8. *cap.* 19. takes notice, and provides for the recovering it, where 'tis denied or neglected to be paid, and 'tis reaſonable it ſhould be ſo, becauſe 'tis valued in the Queen's Books, and She receives an yearly Tenth out of it.

The Act ſets forth, *That Sinodies due out of Religious Houſes diſſolved, ſhall be paid to Biſhops and Archdeacons, by the Occupiers of*.

of those very Lands, if Ecclesiastical Persons were seised thereof within 10 *Years before their Dissolution; and if in Suits in the Spiritual Court the Defendant shall be Convict, the Plaintiff shall recover the value thereof in Damages, together with Costs of Suit; the like he shall recover at Common Law, when the cause is determinable there.* And from hence some infer, that Sinodals are due by Act of Parliament, and not *ratione Visitationis.*

Tithes.

TITHES being the great and legal support of the Clergy, I shall be the more particular in Treating thereof; and first I shall give an Historical account of the Right which they have to receive them.

We are directed by reason to offer something to God, as an acknowledgment of his Blessings, from whom we receive all that is good.

I know 'tis objected, that his Dominion over the whole is so universal and extensive, that it may seem absurd to offer him any part; but yet the Scripture it self commands us to honour him with our Riches, and with the first Fruits of our Encrease; and by the *Mosaical Law* the People were commanded to bring the first Fruits of their Land into the House of their God; and after they had possession of the Land of *Canaan*, they were commanded to bring to the Priest the first of all the Fruit of the Earth, in a Basket, as an acknowledgment that they enjoyed that Land by the Gift of God.

The proportionable part (that is, the Tenth) was paid by two Patriarchs long before the Law; for *Abraham* paid to *Melchisedick*, not only the Tithes of the Spoils which he brought in his return from the Slaughter of his Enemies, (*a*) but the Tithes of all things, and these were paid to him as a Priest, for such he was, and of the most High God, and it was in that capacity, and not of a King, that he met *Abraham*, for he was not assisting him in the Wars, but met him as he returned with Victory.

After *Abraham*'s Death, the Patriarch *Jacob* made a Solemn Vow to return unto God the Tenth of all which he should bestow on him, and 'tis probable that being himself *Abraham*'s Grandson, he had observed what was done by him, and therefore fixed on the Tenth rather than on any other part.

The Jews, who were the Posterity of the Patriarcks, were told by *Moses*, that all the Tithes of the Land were the Lord's,

(*a*) Heb. 7. 2.

not

not in the literal Senſe, but as they were devoted and due to God, who aſſigned his right to the Levites in theſe words, *viz. I have given the Children of* Levi *all the Tenths in* Iſrael.

'Tis true, the Jews paid more than the Tenth to the very time of the Deſtruction of the Temple; but before the *Moſaick Law* the juſt Tenth part was paid by the Patriarchs, and in conformity to that proportion the Tenth was paid to the Levites under the Law, which was called the firſt Tithing, and this was accounted an Inheritance which was to continue for ever, after the other Tithes ſuperadded by that Law were Aboliſhed with it, ſuch was the leaving one corner of the Field unreaped, amounting to a Sixtieth part, the offering the firſt Fruits, the redeeming the firſt Born both of Man and Beaſt.

Therefore this proportion being paid by the inſpired Patriarchs, it became a ſettled Proviſion for the Levitical Prieſthood, and was univerſally paid even by the Heathens themſelves, who derived this Cuſtom from them by Tradition, and not from any poſitive Law of *Moſes*; for in imitation to ſuch payment as made by *Abraham*, they paid Tithes of Spoils to their Kings or chief Magiſtrates, which was never done by the Jews, and this was not only Voluntary but it was of the Beſt, and it was from thence that *Edecumata* ſignified the chiefeſt thing, and *Fluctus Decumanus* the higheſt Wave.

It was a proportion agreeable to the reaſon of the greateſt part of mankind, and it being generally paid by the Gentiles when our Saviour was Born, there ſeems to be no occaſion of any poſitive or expreſs command in the Goſpel for this payment, becauſe both Jews and Gentiles were agreed in it before.

However, we have ſome imitations of it there, for what elſe can we intend of *rendring unto God the things which are God's*, which the Fathers interpret to be Tithes, firſt Fruits and Oblations, for no Man can think it was meant Literally:

Beſides, our Saviour Himſelf ſpeaks of Tithing Mint, Anniſe and Cummin, and he appointed a (*b*) maintenance for the Miniſters of his Goſpel, which could not be leſs than a Tenth part, becauſe a meaner Prieſthood had ſo much before he was Born, and another reaſon may be, becauſe the Chriſtian Prieſts were commanded to be Hoſpitable, which could not well be with a ſmaller proportion.

'Tis true, the Apoſtle expreſſes himſelf indifinitely to his *Corinthians*, *viz. That they which preach the Goſpel ſhould live by it*, but this livelihood muſt certainly be the Tenth part, becauſe

(*b*) 1 Cor. cap. 9, 13, 14.

it

it was to be like that of the Jewiſh Prieſts and Levites, and this appears by the beſt Expoſitors of that Text.

But the meaning is plain without an Expoſition, and this out of the whole frame and contexture of the Words thanſelves, and the Verſes relating to this matter.

Do you not know that the Levites *who Miniſter about holy things live of Tithes, and that the Prieſts who wait at the Altar are partakers of the Oblations and Sacrafices?* The Similitude follows, *Even ſo hath the Lord ordained that the Chriſtian Prieſts who preach the Goſpel ſhould live of the Goſpel*, that is, they ſhould live of what is devoted to Chriſt, as an acknowledgment to him for his Goſpel.

So likewiſe the Apoſtle writing to the * *Galathians*, enjoyns them who are taught in the Word, to give ſome part of their Temporal Goods to the Teacher; 'tis true, he doth not name the Tenth part in *Terminis*, for it was generally obſerved throughout the World, and therefore there was no occaſion to be particular in it, eſpecially ſince that part was ſet aſide for this purpoſe from the beginning of time, and approved by God himſelf.

I ſhall inſiſt no longer upon this; and ſhall but juſt mention what was done by the primitive Chriſtians in relation to this matter, and ſo proceed to ſhew when Tithes were paid here amongſt us.

But firſt I muſt Anſwer that Objection which is uſually made, that Tithes were not paid till about the end of the firſt 400 Years after Chriſt, and that there was not any Canon made in the *African* Councils for ſuch payment.

'Tis true, there might be no ſtated or regular payment at that time, becauſe the Church was then under Perſecution; but if the Chriſtians in the beginning gave more than the Tenth, as certainly they did, then there could be no occaſion for a Canon to enjoyn them to pay it.

And 'tis plain they gave more, for they Sold their Poſſeſſions and brought the Money into the Common Treaſury of the Church. † *Tertullian* tells us, that all things were in common amongſt them, but their Wives, and not only the Money which was raiſed by Sale of their Eſtates, but they made Oblations every Week, or at fartheſt every Month, to the Church. And we are told by St. *Cyprian*, that even thoſe Offerings were anſwerable to the Levites Tenths, from whence we may infer, that Tythes were paid at that time.

* Gal. 6. 6. † Apolog. cap. 39.

But ſoon after Kings and Princes were converted to Chriſtianity, and the Church began to be ſettled, we have plain Proofs of the payment of Tithes.

Among us here in *England*, 'tis probable that Tithes were paid by our *Saxon* Anceſtors, as ſoon as they were converted from Heatheniſme; for King *Ethelbert* made a Law againſt taking away *Res Eccleſiæ*, which they called God's Fees, and theſe were granted to the Church *a Rege Baronibus & populo*, and the Laws of King *Ina* long before that time enjoyn the payment of Church Shot. And ſeveral other *Saxon* Kings made Laws that the Church ſhould have its Revenue, and that the Clergy ſhould have the firſt Fruits, all which may be expounded of Tithes, becauſe they were paid to the Church.

This appears by the practiſe of *Eadbert*, who was Biſhop of *Lindisfarne*, in the beginning of King *Ina*'s Reign; 'tis true, he could pay no Tithes himſelf, becauſe he was a Clergy-man, and therefore he gave them every year to the Poor.

About 50 Years after him, *Boniface*, Biſhop of *Mentz*, wrote an Epiſtle to *Cuthbert*, Archbiſhop of *Canterbury*, wherein he expreſly mentions Tithes, as uſually paid in thoſe days; and in Archbiſhop *Egbert*'s Canons, which were Collected by him in the year 750, we Read of Prieſts who were commanded to teach the People to pay Tithes; that the Receiver was to Regiſter the Names of ſuch as paid, and that no Man ſhould take them from ancient Churches, nor any Secular Service be done for them.

'Tis likewiſe true, that in obedience to theſe and other Canons, Tithes were paid here in ſome particular places; but King *Ethelwolph*, who was the firſt Hereditary Monarch of the Engliſh *Saxons*, made a Voluntary Donation of Tithes to be paid throughout the Kingdom, and this was done in a General Council, with the free conſent of the Spiritual and Temporal Lords, and a multitude of other People, which Donation was confirmed by many of his Succeſſors, even to the time of *Edward* the Confeſſor, who made a Law that the Tenth of all Corn ſhould be paid to God, as due to Him, and tells us in what manner both Prædial and Perſonal Tithes ought to be paid, and that if any Perſon ſhould diſobey that Law, he ſhould be compelled to pay this Duty by the King and the Biſhop, and thus it ſtood till the Conqueſt.

It would be very tedious to mention all the Canons and Conſtitutions which were made in Provincial Sinods in the Reigns of the *Norman* Kings relating to this purpoſe, therefore I ſhall only ſhew that Tithes were paid here long before the Parochial Right was fixed, which ſome would have to be a little

little before the *Lateran* Council *Anno* 1215, but that must be a mistake. For Pope *Adrian* the 4th decreed the Monks of *Doxley* to pay Parochial Tithes, as fully as had been paid before they came into that Parish, which was in the year 1144, and that was above 70 years before that Council was held, (*a*) for then that Abby was founded.

'Tis probable that Parochial Tithes were more strictly paid to the Secular Clergy for some time after that Council than before, because they could not be otherwise deposed or appropriated at that time to any other uses, even with the Bishop's consent.

But about 15 Years afterwards, when the Monks found that the Pope and the Bishops began to appropriate several Tithes to Monasteries, which they had taken from the Secular Clergy, then the School-men, and particularly *Alexander* of *Hales*, who was a Monk himself, invented a Doctrine to Justifie such Proceedings, and that was by asserting a competency to be due to the Clergy by the Laws of God, but that the Tenth part was instituted by the Church in meer condescention to the Laity, intimating that they ought to pay a Tenth to the Rectors, but a great deal more to the Friars.

If this Doctrine had been true, it might have Justified those Monks in possessing a great part of the Parochial Tithes, and assigning a small portion to the Vicars as a *competens beneficium* to officiate in Churches.

But it was invented by them out of a base and covetous design; it destroyed that Doctrine which had been received amongst Christians for many Ages, and tho' *Erasmus* himself and some other great Men were inclined to this new Opinion of the School-men, yet he was certainly of another mind when he was inducted into a Parsonage in *Kent*, and received Tithes there.

I shall now proceed to the Reign of *Hen.* 8. who confirmed those Canons relating to Tithes, which were made in the Reigns of his Predecessors, this he did * after he renounced the Pope's Supremacy by a particular (*b*) Statute made for that purpose; And by which it was Enacted, *that Tithes should be paid according to the Ecclesiastical Laws of the Church of* England, *and according to the customs in every Parish where they shall grow due*, and the Reason is given in the purview of the Act, *viz. because they are due to God and his holy Church.*

And 'tis to be observed, that before Lay-men had any Grants of Monastery Lands to hold them discharged of Tithes, in

(*a*) Dugd. Mon. fo. 827. * Anno 1536. (*b*) 27 Hen. 8. cap. 20.

the ſame manner as they were held before the Diſſolution, care was taken to alienate the Tithes of thoſe Lands, by the conſent of the Biſhop, and that due payment might be made thereof to the Parochial Rectors.

Thus it appears that Tithes were paid by the inſpired Patriarchs, that ſuch payment was likewiſe enjoyned under the *Moſaical* Diſpenſation, and not repealed by the Goſpel; that the ancient Fathers held them due to the Church, and that they were conſtantly paid in the firſt Ages of Chriſtianity, and here in *England* as ſoon as our *Saxon* Anceſtors were Converted from Heatheniſme, and this in Obedience to the peculiar Laws of God; but when Chriſtians became cold in their Devotion, then the payment was enforced by Temporal Laws, till afterwards, by the free and voluntary Donation of King *Ethelwolph*, who had all the Lands of *England* in Demeſne, and by a kind of Parliamentary conſent of that time, (as Mr. *Selden* calls it) they were for ever dedicated to the Church, and this hath ſince been confirmed, not only by Canons, but by ſeveral Statutes, and particularly by *Magna Charta*, and the Clergy have enjoyed them by virtue of thoſe Laws 800 Years and upwards, ſo that 'tis now a peculiar Eſtate veſted in them, and diſtinct from the Inheritance of the other 9 Parts, and they have as good, if not a better right to it, than any Layman hath to his Eſtate, if ſuch a right can be acquired by a Voluntary Donation, and be Eſtabliſhed by a long and continued Poſſeſſion, and confirmed by many Acts of Parliament, as certainly it may.

Having ſaid thus much for the civil right of Tithes, I ſhall in the next place give an account of the definition of the word, and then ſhew how 'tis divided.

Tithe is a Tenth part in propriety of Speech, or ſomething in lieu thereof, yearly ariſing out of the Encreaſe or Profits of Land or Stock, or raiſed by the Induſtry of the Pariſhioner.

And agreeable to this Definition, the Common Lawyers divide it into Three parts:

(1.) *Prædial.* Which ariſes meerly from the Ground, as the Fruits thereof, *viz.* All ſorts of Grain, Hay, Underwood, Fruits of Trees, as Acrons, Apples, Cherries, *&c.* alſo Hops, Saffron, Hemp, Flax, Garden-Herbs, as Parſley, Mint, *&c.*

(2.) *Mixt.* Which ariſe from Cattle nouriſhed by the Ground, as Colts, Calves, Lambs, *&c.* Milk, Cheeſe, Eggs, Chicken, Geeſe, *&c.*

(3.) *Perſonal.* Which ariſe from the Labour and Induſtry of Men uſing any Merchandize or Manual Occupation, and this is the Tenth part of their clear Gain, the Charges and Expences being firſt Deducted, 1 *Roll. Abr.* 656. *Plito* 1. There-

Therefore if an Owner of a Ship lend it to Mariners to carry on the fiſhing Trade, who agree to pay a certain quantity of Fiſh for the hire of the Ship, no Tithe ſhall be paid of theſe Fiſh, becauſe 'tis a perſonal Tithe, and ought to be paid out of the clear Gain.

To whom due.] Theſe Tithes, be they of what nature they will, are properly due to the Clergy who have the cure of Souls, and are to be paid to them in the Pariſhes where they ariſe.

But yet in ſome Caſes the Parſon of one Pariſh may preſcribe to have a portion of Tithes ariſing in another Pariſh; this is where the Abbots and Priors had ſuch Portions before their Houſes were diſſolved, in ſuch caſe the Impropriators may claim them now, and the uſage ſince the Diſſolution is an Evidence how it was before.

And as Tithes are due to the Clergy, ſo a Layman was not capable of them *in prender*, but in ſome particular Caſes, as for inſtance, * a Lord of a Mannor preſcribed to pay to the Parſon of *H.* in whoſe Pariſh his Mannor was, ſo much in ſatisfaction of all Tithes ariſing in the ſaid Mannor, and that in conſideration thereof he and all thoſe whoſe Eſtate he had therein enjoyed all the Tithes there, this was held a good Preſcription.

But ſince the *Statute* of Diſſolution of Monaſteries, the Tithes which were appropriated to thoſe Religious Houſes are made a Lay-Fee, and many Laymen are capable to have them in *pernancy*, and may ſue for them in the Eccleſiaſtical Court.

Out of what Tithes ariſe.

'Tis regularly true, that Tithes are to be paid of things encreaſing annually *Simul & ſemel*, and therefore my Lord *Coke* affirms, that they are not to be paid of *Minerals*, nor of *Chalk*, *Lead*, *Slate*, *Stone*, *Tin*, *Turffs*, &c. but this Rule is to be underſtood where there is no Cuſtom to the contrary; for if this Rule ſhould be true, then no Tithes could be paid of Houſes; for a Houſe which is built doth not yearly encreaſe, nor of Paſture Lands, becauſe it muſt not be only *Simul* but *Semel*.

So things which are *feræ naturæ* are not Titheable, but ſome Queſtions have been made what theſe are, for Bees, Pidgeons, Rabbits, which are kept under Cuſtody, cannot properly be ſaid to be *feræ naturæ*, for they are a Man's Property.

* 2 Rep. 44.

But ſome things which are *feræ naturæ* and under no manner of Cuſtody may be Titheable by Cuſtom, as *Fiſh* in the Sea when caught.

How to be ſet out. The nine parts of predial Tithes are to be ſet out in the preſence of the Parſon or his Servant upon *notice given*, but this is by vertue of the Canon Law which was never received here; for by the Common Law *notice* is not requiſite, and ſo it was adjudged between *Chaſe* and *Ware*, 1 *Rol. Abr.* 643. *Plito* 1.

But when the Tithes are once ſet out and the Parſon neglects to carry them away, in ſuch caſe the Owner or Farmer of the Ground muſt give *notice* to the Parſon, that his Tithes are ſet out before he can put his Cattle in, or ſue him for not taking away the Tithes.

However the Parſon (*a*) is not to be obſtructed in carrying them away, for if the Owner, *&c.* will not let him or his Servants come the uſual way, then, tho' the Tithes are ſet out, 'tis a fraudulent ſetting them out, becauſe it appears to be with an intention to hinder the Parſon from taking them away.

Neither can he be hindred from coming on the Ground to ſee his Tithes ſet out.

I now come to the particular things for which Tithes are to be paid, and for which not, and to proceed in an Alphebitical manner, I will begin with *Abby Lands*.

Abby Lands.] At the time of the Diſſolution of Abbys (*b*) they were diſtinguiſhed into the greater and leſs, the one were above 200 *l. per Annum*, and the other were under that yearly value.

Now when the greater were diſſolved by the *Statute* 31 *H.* 8. *cap.* 8. it was enacted, *That the King and his Grantees ſhould enjoy theſe Lands diſcharged of Tithes in as ample manner as the Abbots held them before that time*; but the Lands of the leſſer Monaſteries which were diſſolved by the Statute 27 *H.* 8. are not within the Benefit of the Act 31 *H.* 8. and therefore ſince the Diſſolution theſe Lands pay Tithes tho' they paid none whilſt in the hands of the Abbots, *&c.* for their Privileges being Perſonal were extinguiſhed by that *Statute* 27 *H.* 8.

Acrons.] Shall pay Tithes, becauſe (*c*) they encreaſe every Year, but then they muſt be gathered and ſold, for if they drop and Hogs eat them, no Tithes are to be paid.

(*a*) 1 Bulſt. 108. (*b*) 2 Cro. 667. Jones 2. (*c*) Moor 762. Het. 87. Lit. Rep. 40. 1 Rol. Abr. 640. Q. 10.

After-

Aftermoath.] There have been various and contradictory Opinions concerning Tithes of *Aftermoaths*; my Lord *Coke* (*d*) in his Expoſition of the *Statute* 2 *Ed.* 6. tells us that Tithes ſhall not be paid of it, for 'tis freed by the Common Law and Cuſtoms of the Realm; I ſuppoſe he means by the general Cuſtom, becauſe in ſome particular places it may be due by Cuſtom.

But Serjeant *Rolls* (*e*) tells us, that ſuch Tithes are due *de jure* and therefore there muſt be either a Cuſtom or Preſcription to diſcharge them, *viz.* in conſideration of making the Tithes of the firſt Moath into Hay (*f*) at the charge of the Pariſhioner, he had been diſcharged of the *Aftermoath*, this hath been held a good *Modus*.

But I take it to be the better Opinion that ſuch Tithes are not due *de jure*, becauſe 'tis againſt the rule *de annuatim renovantibus ſimul & ſimel*, and wherever 'tis demanded if it appear upon the pleading, that the Owner was at greater Charge and Labour then what the Laws appoint in preparing the firſt Crop for the benefit of the Parſon, the Land ſhall be diſcharged from the payment of Tithes of the ſecond Crop, (*g*) as for inſtance, in a Suit for Tithes of the Aftermoath, the Defendant pleaded, that he, at his own Coſts, tedded the Graſs, and then ſpread it and gathered it into Cocks, or that he carried it to the Parſons Barn, in ſuch caſe, becauſe the Parſon had the benefit of the Pariſhioners Labour, it ſhall be a good diſcharge for the Tithes of the Aftermoath.

So if the Defendant ſuggeſts a Cuſtom in a Pariſh, that the Pariſhioner is to cut the Graſs and make it into Cocks and ſet out the tenth for the Parſon, (*h*) which he hath uſed to accept in ſatisfaction of the firſt and ſecond veſture, this is a good Preſcription.

But Tithes may be due for Aftermoath by Cuſtom, and * Sir *Simon Degg* expreſly affirms, that if a Meadow is ſo rich that it yields two Crops the Parſon ſhall have Tithes of both; but this muſt be by vertue of ſome Cuſtom, becauſe 'tis againſt the known Rule abovementioned.

Agiſtment. This is taking to Paſture the Cattle of other Men, or depaſturing barren Cattel of the Owner.

In the firſt caſe it was formerly held that Tithes were not paiable, and ſo is *Fitzherbert* (*i*) in his *Natura Brevium* expreſly.

(*d*) 2 Ed. 6. cap. 13. 2 Inſt. 652. (*e*) 1 Rol. Abr. 640. (*f*) 1 Rol. Abr. 648. Hob. 250. (*g*) More 758. 1 Rol. Abr. 640. 2 Cro. 42 (*h*) Moor 910. Cro. Eliz. 660. 1 Rol. Abr. 648. 2 Lut. 1074. 2 Cro. 116. Yel. 86. Hob. 250. * Fol. 155. (*i*) F. N. B. 58. Lit. G.

But now the Law (*k*) is otherwiſe, and ſo far from determining that no Tithes are due, that 'tis held they are due *de communi jure*, and 'tis reaſonable that it ſhould be ſo, for otherwiſe the Owner might feed all his Land with barren Cattle, and ſo defraud the Parſon of his Tithes, for no other Tithe can be paid of barren Cattle.

If a Man breeds or buys unprofitable Cattle and ſells them, he ſhall pay for the Agiſtment, but if he depaſture his Land with his own Saddle Horſes, he ſhall pay no Tithes, (*l*) if an Inn-keeper puts in the Horſes of his Gueſts he ſhall pay for the Agiſtment, unleſs he paid Tithes for the Hay of the ſame Land.

If profitable Cattle, as Cows, Oxen, *&c.* are fed together with Barren, (*m*) the Owner ſhall pay Tithe in kind for the profitable Cattle, and Tithe of the Herbage for the reſt.

But if Cattle are bred for the Plough or the Pail, no Tithe ought to be paid for their Paſture, that is, if they are employed for that purpoſe in the Pariſh where they were bred, (*n*) but if the Owner ſells them he muſt pay Tithes of the Herbage.

The Tithing in ſuch caſe is to be governed by the yearly Rent of the Land; but by the Canon Law 'tis by the number of Cattle, and the time of depaſturing them in the Pariſh according to the Cuſtom of the place.

If by the yearly value of the Rent, then 'tis after the rate of 2 *s. per Pound*, yet the twentieth part is generally accepted.

This Tithe may be paid by the Owner of the Land or his Tenant, but 'tis certainly due from the * Owner of the Cattle, becauſe they take the profits of the Soil; but becauſe it may be inconvenient for the Parſon to find out the Owner (*o*) of the Cattle, therefore the Owner of the Land is uſually ſued.

Aſh.] Above twenty years growth is not Titheable, for 'tis Timber.

Aſp.] Is not Titheable for the ſame reaſon.

Bark.] Of Timber-Trees is not Titheable, for 'tis privileged by the body of the Tree.

Barren Land.] Tithes are not due for Land (*p*) which is naturally barren, and not manurable without ſome extraordinary charge; and 'tis in reſpect of ſuch charge, and for the advancement of Husbandry, that if ſuch Land is converted to Tillage it ſhall be diſcharged of Tithes for the firſt * ſeven Years after the improvement.

(*k*) Hardres 184. (*l*) Popl. 142. (*m*) Degg 167. (*n*) 1 Rol. Abr. 646 * Joner 254. Hardres 184. (*o*) 1 Rol. Abr. 656. (*p*) 2 Inſt. 656. * Prt. Stat. 2 Ed. 6. cap. 13.

But

But Land which is overgrown with Bushes, or become unprofitable by (q) ill Husbandry or other Accident cannot be properly said to be barren Land, and therefore if 'tis grubbed or Plowed and Sowed it pays Tithes immediately.

So likewise (r) Land gained either from fresh Waters by draining, or from the Sea, tho' with great charge cannot be called Barren, for 'tis unprofitable only by accident.

And if the Defendant pleads 'tis barren and that Plea is not allowed in the Spiritual Court a Prohibition will be granted.

Beech.] In some Countries where Timber is scarce (s) Beech is used for building, and so we are told 'tis in *Buckinghamshire*, and in such case, if above twenty Years growth, 'tis priviledge by the *Statute* 45 *Ed.* 3. *cap.* 3. but 'tis necessity and not the nature of the Tree which makes it Timber, (t) for wherever other Timber may be had there Beech is not used for building, and so becomes Titheable.

Bees.] It hath been a question whether any Tithes should be paid for Bees *quia animalia sunt volatilia*, or what we call *feræ naturæ*; but 'tis now held that Tithes are to be paid for them, and 'tis properly a predial Tithe, which is not paid by the tenth Swarm, but by the tenth measure of Honey, and tenth pound of Wax, and a *Modus* (u) to pay so much will be a good discharge to pay the tenth Swarm if such a Tithe can be due, for it hath been doubted, because Bees are *feræ naturæ* as before mentioned; but tho' they are so, yet when they are gathered into Hives they are then under Custody, and Tithable by the Hive or Swarm, tho' the general way is by the Honey and Wax.

Birches.] Are Tithable tho' of above twenty Years growth (x) for they are not accounted in Law proper Timber for Building.

Brick.] Tithes are not to be paid for Bricks, because they are made of parcel of the Freehold, and if a Suit should be brought for such Tithes (y) the Defendant may suggest the general immunity, and that Bricks are made of Earth which doth not renew.

Neither shall Tithe be paid for Wood cut for burning of Bricks if used either to enlarge or repair the Owner's House, but then it must be suggested that it was for the necessary Habitation of his Family, for otherwise he might built a Castle.

(q) Cro. Eliz. 475. Moor 909. (r) Cro. Eliz. 475. 3 Bulst. 165. Hetl. 147. 1 Rol. Rep. 354. (s) Moor 541. 1 Brownl. 94. (t) 1 Rol. Abr. 640. 1 Rol. Rep. 355. Moor 841. (u) 1 Rol. Abr. 651. Plito. 150. (x) Moor 907. (y) 2 Brownl. 32.

Broom.] Tithes are not due for Broom (z) uſed for Fuel in the Pariſh where it grows.

Calves.] The tenth Calf is due to the Parſon when 'tis weaned, and he is not obliged to take it before, and ſometimes the Tithe is to be proportioned with reſpect to the places where they are engendered brought fourth and nouriſhed.

But if under the number of Ten in one Year, the Parſon cannot have Tithes in kind in that Year without a Special Cuſtom, but may take it ſo in the next Year, accounting both Years together, or Tithe *pro rata* in the ſame Year if there is any Cuſtom for it.

But 'tis a good *Modus* to pay one Calf if he hath ſeven in one Year, and if under ſeven then an half-penny for every Calf for the Tithes of all Calves in that Year, and if he ſells a Calf to pay the tenth of the value, 1 *Rol. Abr.* 648. *Plito* 2.

Cattle.] Thoſe which are bred for the Plough and Pail pay no Tithe for their Paſture, becauſe the Parſon hath the benefit of the Labour of Plough-Cattle by tilling the Ground for Corn, and Tithe-Milk for thoſe which are bred for the Pail.

But in the firſt caſe it muſt be alledged that the Cattle were uſed to manure the Ground in that very Pariſh, 2 *Cro* 575. 1 *Rol. Rep.* 62. 2 *Cro.* 430.

If ſuch Cattle are bred or bought to ſell again, and accordingly are ſold before they are uſed, Tithes ſhall be paid for them; but not if he kill and ſpend them in the Houſe, 1 *Rol. Abr.* 647. *Plito.* 13.

If ſuch Cattle are paſt their Labour, and the Cows are Barren, and afterwards fatted in order to ſell, they ſhall pay Tithes during the time they were fatting for the reaſon of the diſcharge then ceaſeth, 1 *Rol. Abr.* 647. *Plito.* 9.

If Cattle are bred for the Plough, tho' the Owner hath no arable Land in the Pariſh where they were bred, yet they ſhall pay Tithes where fed, *Hardres* 184.

If a Man ſows his Land to feed his Horſes uſed for Tillage, there ſhall be no Tithe paid for ſuch Paſture, but if he keeps Horſes to ſell, and accordingly ſells them, he ſhall pay Tithes.

Cattle feeding on large Waſts not known to be in any particular Pariſh, ſhall pay Tithes to the Parſon of that Pariſh where the Owner lives, and if fed in ſeveral Pariſhes, they ſhall pay Tithes *pro rata*, ſo as they continue above a Month in each Pariſh.

But where the manner of Tithing barren Cattle is not made certain by Cuſtom, it ſhall be computed according to the

(z) Cro Eliz. 609. 1 Rol. Abr. 644.

value

value of the Land on which they are depaſtured by the payment of 2 *s.* *per* pound Rent, *Hardres* 35.

Chalk.] Chalk and Chalk-Pits are not Titheable.

Cheeſe.] If the Milk pays Tithes the Cheeſe pays none, but it may be a good Preſcription to pay the Tenth Cheeſe made between *May* and *Auguſt* for all Tithe Milk in that Year.

Cherry-Trees.] Cherry-Trees in *Buckinghamſhire* have been adjudged Timber, and therefore Tithe-free.

Chicken.] Chicken pay no Tithes, becauſe the Eggs are tithed, 1 *Rol. Abr.* 642. *Plito.* 6.

Clay.] Clay is not Titheable.

Cloathes.] Cloathes fulled in a Fulling-Mill, ſee Mill.

Colts.] Are not Titheable, therefore a Preſcription *de non decimando* as to them is good.

Colts.] The ſame with Calves.

Conies.] Tithes are not paid for Conies *de jure*, becauſe they are *feræ naturæ*, but by Cuſtom they may become due, but now 'tis generally held that if they are ſold in the Market and not ſpent in the Houſe, Tithes ought to be paid for them, and yet they are *feræ naturæ*, let them be ſpent or ſold where they will, 1 *Rol. Abr.* 635. *Plito.* 3. *March.* 87. *Hardres* 188. *Het.* 147. *Lit. Rep.* 3.

Corn.] Corn pays a predial Tithe, tho' it ariſes every Year out of the Land, but 'tis by the Labour and induſtry of the Husband-man, and it ought of common Right to be cut down by the Owner and prepared for the Parſon, and Tithed by the tenth Cock, Sheaf, or Shock, and if the Pariſhioner refuſe to do it, the Parſon may ſue him in the Spiritual Court, but it muſt be ſpecially for not ſetting it out in Cocks, and not generally for not ſetting out the Tithes, *Latch.* 125. *Sid.* 183.

But the Pariſhioner is not bound to put the Parſons Sheaves into Shocks unleſs by Cuſtom, 1 *Rol. Abr.* 644. *Plito.* 6.

If he doth not ſet out the Tithes, he is liable to be ſued in an Action of Debt upon the *Statute* for treble Damages, and if he doth ſet them out and afterwards carry them away, the like Action may be brought againſt him, becauſe the ſetting out was with a fraudulent deſign to cheat the Parſon.

But 'tis clear that an Action of Treſpaſs lies againſt him, or he may be ſued in the Spiritual Court; but if a Stranger takes them away, he muſt be ſued in an Action of Treſpaſs at Common Law.

A Preſcription to pay the Parſon the tenth Sheaf, *as it falls out*, or the tenth *Swarth* is not good, 1 *Rol. Abr.* 643. *Plito.* 6.

But

But a Preſcription to be diſcharged of Tithes in that Year wherein the Field was fallow in conſideration he had ſet the Sheafs into Shocks when the Field was ſowed, this is good. 1 *Rol. Abr.* 649. *Plito.* 4.

Cows.] Cows which are Milked pay no Tithe for their Paſture, but if a Man hath but one Cow and doth not make any Cheeſe, ſomething ought to be paid, but the Cuſtom of the place is to be obſerved. *Cuſtom*, ſee *Modus*.

Deer, ſee **Park.**] Deer are not Titheable *de jure*, becauſe they are *feræ naturæ*, *Noy* 148. *Het.* 147. but they may pay Tithes by Cuſtom.

Elm.] Elm above 20 Years growth pays no Tithes, for 'tis Timber.

Eggs.] Eggs are Titheable in kind, and where ſuch Tithes are paid, there is none due for the Chicken; ſo where Tithe is paid for Chicken there is none due for Eggs.

It is a good *Modus* to pay thirty Eggs in *Lent* for all Tithes of Eggs, 1 *Rol. Abr.* 648. *Plito.* 3.

Fallow-ground.] Fallow-Ground pays no Tithes for the Paſture in that Year in which it lies fallow unleſs it remain beyond the courſe of Husbandry, for it makes the Land more Fruitful the third Year, 1 *Rol. Abridg.* 642. *Plito* 9, 649. *Plito* 4.

Fere Nature.] Beaſts and Birds which are *Feræ Naturæ* are not *Titheable*, but Rabbits in a Warren, and Pidgeons in a Dove-Houſe are not properly *Feræ Naturæ*, becauſe they are kept under Cuſtody, and by that means are reduced to be the Property of particular Perſons, and ſo are Bees under a Hive, and therefore all theſe pay *Tithes* by Cuſtom.

Fenny Grounds.] Fenny Grounds drained from the Water and made enable, or converted into Paſture, muſt pay *Tithes* notwithſtanding the *Statute*, 2 *Ed.* 6. 3 *Bulſt.* 165. *Moor* 430.

Fiſh.] Fiſh taken in the Sea are not Titheable *de jure*, becauſe they are not only *Feræ Naturæ*, but the Sea is not properly in any Pariſh, 1 *Rol. Abr.* 636. *Plito.* 6. *Cro. Car.* 264.

But if that is a good reaſon, then they ſhould pay *Tithes* when caught in a River, becauſe moſt Rivers are in ſome Pariſh, and yet Fiſh caught in a Common River pay no *Tithes*, *Cro. Car.* 339. 1 *Rol. Abr.* 636. *Plito.* 6.

'Tis true, *Anno* 9 *Car.* the Court was divided upon this point, but yet they granted a Prohibition to try the Right.

But *Tithes* may be paid by Cuſtom for Fiſh caught in the Sea and in Rivers, and in ſome places in *Cornwall* they pay *Tithes* of Fiſh caught in the Sea to the Parſon of that Pariſh wherein they are Landed, and ſo at *Yarmouth* they pay *Tithes*

for

for Herrings, but not the Tenth Fiſh, but ſo much Money, for this is a Perſonal Tithe, and therefore the Tenth ſhall not be paid unleſs by Cuſtom, 1 *Rol. Abr.* 656. *Plito* 42.

If a Man ſuggeſts a Cuſtom that all the Fiſh in a Ship ſhould be divided into Ten Doles, after the Owner's Part is ſeparated for the uſe of his Ship, and that then the Tenth Dole is to be divided, one moiety to the Parſon, and the other to the Town of *Yarmouth*, this was held to be good, 1 *Rol. Rep.* 419.

Flax.] Flax pays a Prædial Tithe like Hemp, and 'tis accounted *inter minutas decimas*, 1 *Rol. Abr.* 643. *Plito* 3.

Foreſt Lands.] Foreſt Lands not in any Pariſh do generally belong to the Queen by virtue of Her prerogative, and She being ſeiſed of ſuch Lands ſhall pay no Tithes; but tho' this is a privilege annexed to the Crown, it may be a queſtion whether the Grantee of ſuch Lands can have that privilege.

My Lord *Rolls* tells us he may, but 'tis certain, that if a Foreſt is diſforeſted, the Grantee of the Queen ſhall pay Tithes for thoſe Lands which were formerly parcel of the Foreſt, *Jones* 387. *Cro. Car.* 94. *Het.* 60. 1 *Roll. Abr.* 655, 657.

Fowl.] If Fowl are Killed to make Profit of them, the Owner muſt pay a Perſonal Tithe.

Domeſtick Fowl pay Tithe Eggs or Chicken in their ſeveral kinds; but where they pay Tithe Eggs there ſhall be no Tithes paid of Chicken.

Fruit of Trees.] Apples, Pears, Plums, *&c.* pay a Prædial Tithe as ſoon as gathered, and an Action will lie upon the Statute of 2 *Edw.* 6. for ſubſtracting ſuch Tithes, or for not ſetting them out.

Furzes.] Furze pay a Prædial Tithe, unleſs the Owner of the Ground can be diſcharged by Cuſtom, upon payment of Tithe Milk, or Calves of ſuch Cows which are Depaſtured on that Ground where the Furzes grow.

Gardens.] Gardens pay Tithes for Herbs, Hemp, Plants, Seeds, Saffron, Woad, and this muſt be paid in kind, and therefore the Tenth part ought to be ſet out for the Parſon.

Graſs. See **Agiſtment.**] Graſs pays a Prædial Tithe, but if 'tis cut and carried to feed the Owner's Plough Cattle, before 'tis made into Hay, not having ſufficient otherwiſe to keep them, no Tithe ought to be paid for it, 1 *Rol. Abr.* 645.

Where the Cuſtom is not to the contrary, the Pariſhioner ought to make the Graſs into Hay; but in many places the Tenth Graſs Cock is ſet out, and in ſuch Caſe the Parſon may *de jure* make it into Hay upon the Land where it did grow, without alledging a Cuſtom for it, 1 *Rol. Abr.* 643.

A Preſcription to pay the Tenth Acre of Graſs, ſtanding in lieu of all Tithe Hay, is good, 1 *Roll. Abr.* 648. *Plito* 7.

Gravel.] Gravel pays no Tithes.

Hay.] Hay pays a Prædial Tithe as well in Orchards as in Meadows; but no Tithes ſhall be paid for that which grows on Headlands, where the Plow-Cattle can have only room to turn, but then there muſt be a Cuſtom alledged to pay it, and the Party muſt aver that the Headland is only large enough to turn the Plough on it, 1 *Roll. Abr.* 646.

And if once Tithes are paid for Hay, no Tithe ſhall be paid for the after Paſture of the ſame Land, in the ſame Year, 1 *Roll. Abr.* 640.

As to the manner of Tithing it, the Cuſtom of the place is to be obſerved, for in moſt Places the Tenth Cock is ſet out after 'tis made into Hay; but where there is no ſuch Cuſtom, the Tenth Graſs Cock may be ſet out, 1 *Roll. Abr.* 644.

And therefore, tho' the Tithes of Graſs ought of right to be made into Hay, yet a whole Pariſh may Preſcribe to pay the Tithe in Graſs Cocks before 'tis tedded, and this without any conſideration given to the Parſon, 1 *Roll. Abr.* 647. *Plito* 1.

But if 'tis ſuggeſted that the Owners of the Land have, time out of mind, found Straw to Thatch the Body of the Church, and have therefore been diſcharged of all Tithes of Hay, this is not good, for the Parſon hath no benefit by it, becauſe the Pariſhioners are to repair the Church, *Go. Eliz.* 276.

If there is a *Modus* for the Tithe of Hay, and the Meadow is converted into Tillage, the Parſon ſhall have the Tithe Corn, but when the Lands are again converted to Meadow, the *Modus* ſhall revive, *Godb.* 194.

So in conſideration that the Parſon and his Predeceſſors, time out of mind, had been ſeiſed of a Meadow in the Pariſh, the People ſhould be diſcharged of Tithe-Hay, this is good, for it ſhall be intended that the Meadow was originally given to the Church, in diſcharge of the Tithes of the Pariſh, 1 *Roll. Abr.* 649. *Plito* 6. but 'tis not a good *Modus* that in conſideration he had ſpent all his Hay in feeding Plough-Cattle, that he ſhould be diſcharged of the Tithe-Hay, 1 *Roll. Abr.* 650. *Plito* 13.

Heath.] Heath. See Furze.

Hemp.] Hemp pays a Prædial Tithe, and becauſe there were various ways of Tithing it, therefore by a late * Act of Parliament a conſtant Annual Sum of 5*s.* *per* Acre ſhall be paid for Hemp-Land before 'tis carried off the Ground, and ſo in proportion.

* 11 & 12 W.

Herbage.]

Herbage.] Herbage. See Paſture.

Honey.] Honey pays a Prædial Tithe, and the manner of Tithing it is by the Tenth Quart, or Pint, *Cro. Car.* 559. *Jones* 447. 1 *Roll. Abr.* 635. *Plito* 1.

Hops.] Hops likewiſe pay a Prædial Tithe, but the manner of Tithing it is various, according to the cuſtom of the Place; and of this Opinion was Juſtice *Twiſden*, who lived in *Kent*, and affirmed they might be Tithed by the Hills, by the Pole, or by the Buſhel, and if ſo, then the Tenth part may be ſet out before they are Dried, and this agrees with the Caſe Reported by Juſtice *Hutton*, *Sid.* 283. *Hut.* 77.

But my Lord *Rolls* tells us, they ought not to be Tithed before they are dried, 1 *Roll. Abr.* 644. *Plito* 3.

A *Modus* cannot be Pleaded in diſcharge of Tithe Hops, becauſe they were brought into *England* in Queen *Elizabeth*'s Reign; but a Suggeſtion to pay ſo much in lieu of all ſmall Tithes will comprehend Hops, and in ſuch caſe a Prohibition hath been granted, *Sid.* 443. 1 *Vent.* 61.

But Hop-poles are not Titheable, when the Hops pay Tithes.

Horſes. See Cattle.

If a Man keeps a Horſe for the Saddle, no Tithes ſhall be paid for his Paſture; but if the Owner ſhould be Sued, he muſt aver that he kept the Horſe for his Work and Labour, 1 *Rol. Abr.* 641. 2 *Cro.* 430.

The Caſe of *Pothil* and *May* is very imperfectly Reported by Mr. *Bulſtrode*, in his firſt Part, *fo.* 171. *viz.* that no Tithes ought to be paid for the Herbage of Saddle Horſes kept for Pleaſure; but for Cart-Horſes to till the Ground, the Owner ought to be Anſwerable to the Parſon for their Herbage, which is contrary to ſeveral Reſolutions in the like Caſes.

'Tis true, if an Inn-keeper Depaſtures Travellers Horſes, he muſt pay Tithes for the Herbage, unleſs he paid Tithes for the Hay of the ſame Ground, *Hardres* 35. 1 *Roll. Abr.* 641, 650.

But if Horſes are kept to Sell, and afterwards are Sold, Tithes ſhall be paid for their Paſture, 1 *Rol. Abr.* 647. *Plito* 14.

Houſes.] Dwelling-Houſes are not properly Titheable, becauſe they do not Annually Encreaſe; but by a Decree made by the Privy Council, *Anno* 1535, it was Ordered, that 2 *s.* & 9 *d.* ſhould be paid for every Houſe in *London*, which Decree was confirmed by Act of Parliament, *Anno* 37 *Hen.* 8. *cap.* 12.

Now;

Now, this Statute relating only to *London*, and the Liberties thereof, the Queſtion was Solemnly Debated in Dr. *Grant's* Caſe, 11 *Rep.* 16. whether the Pariſhioners of St. *Martins le Grand* ſhould pay 2 *s.* in the Pound Rate for their Horſes there, becauſe it was a Liberty exempted from *London*, and for that no Tithes ought to be paid for Houſes, without a ſpecial Cuſtom, but it was adjudged that ſuch Tithes ſhould be paid becauſe it may be reaſonably ſuppoſed that it was uſual to pay ſo much for the Land before the Houſes were Built on it.

In Dr. *Layfeild's* Caſe, *Hob.* 11. A *Modus* was denied to pay for Tithes of Houſes in the Pariſh of St. *Clements Danes*, without *Temple-bar*, becauſe where no Tithes are due *de jure*, as they are not for Houſes, there can be no *Modus* for it, that being only an Abatement of the full Tenth part, but it was agreed that ſuch a way of Tithing had been long uſed about *London*, and when the Statute took care of that City, the places adjoyning gained the ſame manner of Tithing by Colour thereof.

And tho' a Man ſhould ſuggeſt that the Houſe was held of a Priory, which was diſcharged of Tithes for all their Poſſeſſions, that will not prevail, becauſe there is a ſubſequent Statute which charges all Houſes in *London*, except thoſe of Noblemen, *Moor* 912. 37 *Hen.* 8. *cap.* 12.

Lambs. See **Calves.**] Lambs pay a mixt Tithe; but the payment is uſually guided by Cuſtom.

If the Pariſhioner hath ſix Lambs or under, he ſhall pay a Half-penny for every Lamb, and if he hath above that number, then to pay one Lamb, this is a good Cuſtom.

The Tithe is to be apportioned with reſpect to the places where they are Engendred, brought forth and Nouriſhed, and 'tis to be paid when they are Weaned.

A Preſcription to pay an Half-penny for every Lamb which he ſhall Sell before *May day*, without any other Tithe for them, and he Sells them all before *May-day*, this is not good, for 'tis a meer fraud, 1 *Rol. Abr.* 652. *Plito* 1.

Lead.] Lead is not Titheable *de jure*; but it pays Tithes in *Derbyſhire* by Cuſtom.

Limekiln.] So by cuſtom Tithe may be paid of a *Limekiln*, tho' there is nothing due *de jure*, 1 *Rol. Abr.* 642. *Plito* 7. but not of *Lime*, for 'tis parcel of the Freehold.

Lops of Trees.] Lops above 20 Years Growth pay no Tithes, for the Branch is privileged as well as the Body of the Tree, *Moor* 762, 908. 11 *Rep.* 48.

And ſo 'tis if the Tree was not privileged at the firſt Lopping, yet if afterwards 'tis Lopped, no Tithes ſhall be paid, 1 *Brownl.* 33.

So

So 'tis if the Tree become Rotten and fit only for Fuel, becauſe it was once privileged, *Moor* 908. but Juſtice *Croke* who Reports the ſame Caſe informs us, that the Court was divided, *Cro. Eliz.* 100.

Marble and Marle Pits.] Marble and Marle-Pits pay no Tithes.

Maſt.] Maſt of Oak or Beech, if Eaten by Hogs, then the Tenth of the Value of ſuch Maſt ought to be paid, but if Sold, then the Tenth Penny is due for Tithe.

Mills.] As there are ſeveral ſorts of Mills, ſo the Tithes of them are different, as for inſtance, the Tithes of Corn Mills are Prædial; the Tithes of Fulling, or Paper-Mills are Perſonal, 1 *Rol. Abr.* 656. *Plito* 3, 4.

Copper, *Corn*, *Fulling*, *Iron*, *Lead*, *Paper*, *Plate*, *Powder*, *Rape*, *Saw*, *Stamping* and *Tin* Mills, Of theſe Corn Mills only pay Tithes in kind as Mills, and that is the Tenth Toll-Diſh; and Corn-Mills Built before the Statute 9 *Edw.* 2. are Tithe-free, therefore where a Suit is brought for Tithes of an ancient Mill, the Defendant muſt ſuggeſt that the Mill is very ancient, and hath never paid Tithes, and he muſt make Oath of the truth of this ſuggeſtion, for all new Mills pay Tithes, 2 *Cro.* 429. If a Corn Mill ſhould be built upon any Land diſcharged of Tithes, by any *Modus* the Mill ſhall be likewiſe diſcharged, 1 *Rol. Abr.* 652. *Plito* 4.

But this Caſe ſeems to be unreaſonable, and therefore 'tis not Law; for the Profits of Lands and of ſome Mills are of different natures; the one pays a Prædial, and the other a Perſonal Tithe, and ſo are charged, not in reſpect to their real value as Lands are, but in reſpect to the Labour of Men, 1 *Rol. Rep.* 405. and therefore all Mills, except Corn Mills, pay Tithes not as Mills, for they are only Engines of ſeveral Occupations, and the Perſons uſing them pay Perſonal Tithes if they have been paid for 40 Years next before the Act 2 *E.* 6. 2 *Cro.* 523. 2 *Rol. Rep.* 34. 1 *Rol. Abr.* 641, 19.

If a *Modus* of 6*s.* 8*d.* is paid for the Tithes of an ancient Corn Mill, and the Mill Stream ſhould change its courſe by accident, and not by the act of the Party, and the Owner pulls down his Mill and rebuilds it to the Stream, the *Modus* ſhall ſtill continue, but if he had diverted the Stream himſelf, and then rebuilt the Mill to it, he ought to pay Tithes as for a new Mill, 1 *Rol. Rep.* 641, 652. *Plito* 1.

Milk.] Milk pays a mixt Tithe, 2 *Brownl.* 30.

Sometimes 'tis Tithed by the Tenth Quart, at the Parſonage-Houſe, or any other place, *Cro. Eliz.* 609: *Moor* 909.

But this being very troubleſome, it hath been adjudged to pay the Tenth Meal, and not the Tenth Quart at every Meal; and ſome have been of opinion that this Tenth Meal ought to be carried by the Owner to the Parſonage-Houſe, or to the Church Porch, but this muſt be by Cuſtom, for in all Caſes the Tithes are to be ſet out, and paid where they ariſe, *Raym* 277.

In ſome places they pay Cheeſe, and in other places neither Cheeſe or Milk, but ſome ſmall Rate, ſo that the cuſtom of the place is to be obſerved.

A *Modus* to pay the Tenth Cheeſe made from *May-day* till *Auguſt*, in full ſatisfaction of all Tithe Milk of that year is good, *Cro. Eliz.* 609. 1 *Rolls. Abr.* 651. *Plito* 19.

Mines.] Mines of Braſs, Copper, Coals, Iron, Lead, Tin, pay no Tithes but by Cuſtom.

Modus.] As to a *Modus* I ſhall mention it under the reſpective Titles to which it properly belongs, but this I ſhall obſerve in general, *viz.* that where-ever a *Modus* is alledged, there muſt be ſome benefit left for the Parſon, tho' not the whole which is due, and therefore to preſcribe to be diſcharged of Tithes in conſideration that he had employed all the Profits of ſuch Land to repair the Body of the Church, or to find other neceſſaries for the ſame is not good, becauſe there is no recompence for the Parſon; but if it had been to repair the Chancel 'tis otherwiſe, 1 *Roll. Abr.* 649. *Plito* 8.

Monaſteries. See Abby Lands.

Nurſeries.] Nurſeries of young Trees pay Tithes, for tho' theſe Trees are parcel of the Freehold, yet when they are Sold and ſevered in order to be Tranſplanted into another place or Pariſh, or in the ſame Pariſh, they pay Tithes, otherwiſe all, or the greateſt part of the Pariſh, might be converted into Nurſeries, and ſo the Parſon would have no Tithes, *Cro. Car.* 526. *Jones* 416. 1 *Roll. Abr.* 637. *Hardres* 380.

If the Owner pull them up he ſhall pay Tithes, but if he Sells them to another before they are Tranſplanted, the Buyer ſhall pay it, *Hardres* 380.

Oaks.] Oaks above 20 years Growth, tho' not Timber, and only fit for Fuel, pay no Tithes, *Moor* 541.

Nor ſmall Oaks under 20 years Growth, which are apt for Timber, *Moor* 908.

Orchard.] If the Soil of an Orchard is Sowed or Planted, the Parſon ſhall have Tithes thereof, as well as of the Fruit of the Trees, becauſe they are of diſtinct natures, 2 *Inſt.* 652. 1 *Roll. Abr.* 642, 5.

Park.] If a Park is diſparked, and converted into Tillage, it ſhall pay Tithes in kind; but if there was a *Modus* before it ſhall continue ſtill, 1 *Roll. Rep.* 176. *per Coke.* But

But this muſt be underſtood where the *Modus* was to pay ſo much Money for all Tithes of the Park, for if 'tis for all Tithes of the Deer in the Park, then 'tis otherwiſe, as for Inſtance, if a Man preſcribes to pay a Shoulder of every Deer Killed in the Park, or one Deer out of the Park, in ſuch Caſe, if 'tis diſparked, the Cuſtom is gone, and Tithe ſhall be paid in kind; but if the Cuſtom was to pay a Shoulder of Veniſon generally, or to pay ſo much Veniſon in lieu of all Tithes, and 'tis not ſaid out of the Park there, tho' 'tis diſparked, the *Modus* ſhall continue.

In *Cowper* and *Andrew*'s Caſe, the Court was divided: It was a Prohibition ſuggeſting a *Modus* to pay 2*s.* yearly, and a Shoulder of every Deer killed in the Park; *Hobert* and *Nichols* held, that the *Modus* of 2*s.* continued, notwithſtanding the Park was diſparked, becauſe it was a ſum certain, the other was but caſual; but the other two Judges held that it was an entire *Modus*, tho' it conſiſted in diſtinct Matters, and therefore if part was gone (as they all agreed it was) the whole muſt likewiſe be determined, and the Parſon ought to have the Tithes in kind, and ſo it was afterwards adjudged in *Moor* 909. The principal Caſe is reported in *Moor* 863. *Hob.* 39. 1 *Roll. Rep.* 120. 1 *Roll. Abr.* 651. in which caſe they agreed that only 2*s.* had been paid, then it ſhould continue ſo ſtill.

Pheaſants and Partridges. Partridges and Pheaſants, if made Tame, pay a Perſonal Tithe, but if kept in a Wood encloſed, and their Wings are cut ſo as they cannot fly out, and there they lay Eggs, and hatch Young ones, no Tithes ſhall be paid for them, becauſe, tho' under a reſtraint, they are *feræ naturæ*, and are not reclaimed, for if their Wings were not clipt they would fly out of the Encloſure, 1 *Roll. Abr.* 636. *Plito* 5.

Paſture.] See Agiſtment: See Graſs.

Peaſe.] If Peaſe are gathered Green, to ſpend in the Owner's Family, they pay no Tithes, 1 *Roll. Abr.* 647. *Plito* 11.

Perſonal Tithes.] By the Canon Law every Perſon ought to pay a Tenth part of his clear Gains, either by Trade or Merchandize, his Charges being deducted; but the Statute of 2 *Edw.* 6. reſtrains the Canon to ſuch Perſons who had conſtantly paid the ſame within 40 Years before the making that Act.

Pigeons.] Pigeons ought to pay Tithes *de jure* if they are Sold, but not if ſpent in the Owner's Houſe, *Het.* 147. 1 *Roll. Abr.* 644. and the reaſon is, becauſe 'tis a proviſion to ſupport him in his Labour about other Affairs, for which the Parſon may have Tithes, 1 *Roll. Abr.* 635. *Plito* 2. 2 *Roll. Rep.* 2.

But this ſeems to be a very indifferent Reaſon, becauſe in Tithing the nature of the thing is to be conſidered, and not where it is ſpent.

Now, if the place where Pigeons are ſpent would make them not Titheable, when in their own nature they ought to pay Tithes, then Corn, Piggs and Calves ſpent in the Owner's Houſe ſtand upon the ſame Reaſon, and no Tithes would be paid for them, which would be of miſchievous conſequence to the Clergy, if it ſhould be allowed to be Law.

If a Man hath Pigeon-holes about his Houſe, and Pigeons encreaſe there, which are ſpent in his Family, he ſhall pay no Tithes for them, 1 *Roll. Abr.* 644. *Plito* 6.

Piggs.] Piggs pay a mixt Tithe, in the ſame nature with Calves, *quod vide.*

Quarries.] Quarries of Coals, Slat, Stone, Gravel, Sand or Clay pay no Tithes, for they are parcel of the Inheritance, 1 *Roll. Abr.* 637. E. *Plito* 1.

Rakings.] The tenth Cock being ſet out, the Rakings of Corn are not Titheable, unleſs by Cuſtom, for they are left for the Poor, *Moor* 278. 1 *And.* 199.

Theſe Rakings are properly the ſcattering of the Corn whereof Tithes have been paid, but it muſt be underſtood of ſuch Rakings which are not voluntarily and fraudulently left behind; *Cro. Eliz.* 660. *Moor* 910.

Therefore the ſuggeſtion in ſuch Caſe muſt be, that they are *minus voluntarie ſparſæ*, and 'tis not ſufficient to allege that they were *lapſæ in collectione*, 1 *Roll. Abr.* 645. *Plito* 12. *Cro. El.* 702. 2 *Cro.* 575.

Roots.] Roots of Coppice-Grounds grubbed up, pay no Tithes, for they are parcel of the Freehold; they are neither *Creſcentes* or *Renovantes*, *March* 58. 1 *Roll. Abr.* 637. *Plito* 7.

Saffron.] Saffron pays a predial Tithe, and 'tis accounted *inter minutas decimas*, therefore, tho' 'tis enacted *per* Statute of 2 & 3 *Edw.* 6. *cap.* 13. that Tithes ſhall be paid as uſual for 40 Years laſt paſt, before the making that Act, yet, if Corn hath been ſowed in a Field for 40 Years, and the Parſon had the Tithes, and the Field ſhould be ſowed with Saffron, the Vicar ſhall have the Tithes, 1 *Roll. Abr.* 643. V. *Plito* 1. *Cro. Eliz.* 476. *Idem*, *Owen* 74. *Idem*, *Goulds.* 149. *Idem*, *Moor* 909.

Salt.] Tithes muſt be paid of Salt, but this is by Cuſtom only.

Sheaf.] See Corn.

Sheep. See **Wool.**] If Sheep continue in the Pariſh all the Year, they are to pay Tithe-Wool in kind, but if removed from one Pariſh to another, the Parſon of each Pariſh muſt have

have Tithes *pro rata*, but then by the Canon Law they muſt continue thirty days in a Pariſh, otherwiſe a ratable Tithe is due.

If they are fed in one Pariſh and brought into another to be Shorn, they muſt likewiſe pay Tithes *pro rata*.

If they die of the Rot the Wool is not Titheable unleſs by Cuſtom.

If Sheerd about the Neck to preſerve them from Vermin, the Wool is not Titheable, 1 *Rol. Abr.* 645. *Plito*, 14.

So likewiſe if killed and ſpent in the Houſe of the Owner, the Skins are not Titheable but the Wool is, 1 *Rol. Abr.* 647. *Plito.* 10.

Slate is not Titheable, *Cro. Eliz.* 277.

Silva Cædua.] *Silva Cædua*, this is Underwood under 20 Years growth, which being cut renews again from the ſame Stock or Root, and it pays a predial Tithe.

Tares.] Tares cut green and given to Plough Cattle pay no Tithes; but it may be a queſtion whether a Prohibition will be allowed upon a general Suggeſtion of this matter without alledging a Cuſtom in the Pariſh that no Tithes ſhall be paid for ſuch *Tares*, *Lane* 16. *Cro. Car.* 393. *Jones* 357. 1 *Rol. Abr.* 650. *Plito.* 12.

Tiles.] *Tiles* are not Titheable.

Timber and Trees.] *Timber-Trees* and particularly Oak, Aſh and Elm, above the age of twenty Years were diſcharged of Tithes by the Common Law long before the Statute 45 *Ed.* 3. for that Act was in affirmance of the Common Law; and the reaſon of this Privilege is, becauſe ſuch *Trees* are employed for *Timber* to build Houſes, *Cro. Eliz.* 1. 1 *Brownl.* 94.

And if they grow ſo long till they become rotten and fit only for Fuel, yet they pay no Tithes, becauſe being once Privileged, it ſhall not be loſt by their decreaſe, *Cro. Eliz.* 477. *Golds.* 145. *Moor* 541. 2 *Cro.* 100. 1 *Rol. Ab.* 640.

So *Trees* cut for Plough-boot, Cart-boot, Fencing, *&c.* pay no Tithes, tho' they are not *Timber*.

But all *Trees* not fit for *Timber*, and not put to the uſes aforeſaid, tho' above twenty years growth pay Tithes.

Turkeys.] There is a caſe in *Moor* 599. where 'tis held that Tithes ought not to be paid for *Turkeys* or their Eggs, but this muſt be a miſtake, and of that Opinion was Sir *Simon Degg*, *Fol.* 179.

Turfes.] *Turfes* uſed for Fuel pay a predial Tithe, and yet they are parcel of the Soil.

Underwood, see **Wood.**] Underwood pays Tithes, but if uſed for fencing Corn or Paſture-Ground it pays none, *Cro. Eliz.* 499. *Moor* 683.

But then it muſt be for fencing his own Corn, and the reaſon is, becauſe the Owner may give away all his Underwood to fence the Corn of other Men, and if ſo the Parſon can have no Tithes of it.

But 'tis unreaſonable to ſuppoſe any ſuch thing, and if it was probable to be done, yet the Perſon can have no prejudice by it if that Corn was encloſed, of which he had the Tithes, 1 *Sand.* 141.

If the Owner will not cut his Coppice-Wood till above 20 Years growth, yet he ſhall pay Tithes for it, eſpecially if 'tis cut for Fuel, *Sid.* 300.

Waſt.] If there are large Waſt Grounds and 'tis not certainly known in what Pariſh they are, the Cattle feeding there, ſhall pay Tithes to that Parſon where the Owner dwells.

Wax.] Bees-Wax is Titheable *de jure* by the Tenth Pound, 1 *Rol. Abr.* 635. *Plito.* 1.

Willows.] Tho' it may be Waſt to fell Willows, becauſe in ſome places they are uſed for Timber, but eſpecially if they grow ſo as to ſhelter the Houſe from Storms, yet if they are felled, tho' above twenty Years growth, they ſhall pay *Tithes*, *Hob.* 219. 1 *Rol. Abr.* 640. *Q.* 8.

Woad.] Woad pays a predial *Tithe*, and it growing in the nature of an Herb, 'tis accounted *inter minores decimas*, *Hat.* 77. *Idem. Cro. Car.* 28.

Wood.] Wood likewiſe pays a predial *Tithe*, and ſometimes 'tis accounted alſo *inter minores decimas*; as for inſtance, if a Vicaridge is endowed with ſmall *Tithes*, and the Vicar always had the *Tithe* of Wood, in ſuch caſe it ſhall be accounted a ſmall *Tithe*; but 'tis generally eſteemed to be great *Tithes*.

But 'tis not Titheable if ſpent in the Owner's Houſe, tho' it may be ſo by Cuſtom, for 'tis not diſcharged by the Law, 1 *Rol. Abr.* 644. *Plito.* 1. *Cro. Car.* 113. *Het.* 110.

Yet if the Defendant ſuggeſts that it was burnt in his dwelling Houſe, by reaſon whereof the Parſon had *uberiores decimas*, this is good, 1 *Vent.* 75. 1 *Rol. Abr.* 656.

Tithes ought not to be paid for it where 'tis uſed for *fencing Corn*, 1 *Rol. Abr.* 644. *Plito.* 2.

So if 'tis cut and burnt to make Bricks to repair or enlarge the Owner's Houſe 'tis not Titheable, 1 *Rol. Abr.* 645. *Plito.* 8.

But

But then ſuch enlargement muſt not be only for his Pleaſure, nor more then is neceſſary for the Habitation of his Family, for if 'tis not ſo alledged in the Suggeſtion it will be difficult to get a Prohibition, becauſe a general Suggeſtion that the Wood was burnt to make Bricks for the enlargement of his Houſe would be ſo inconvenient, that it might deprive the Parſon of his Tithes, for he might build a Palace, 1 *Rol. Abr.* 645. *Plito.* 10.

If Wood Grounds have likewiſe Timber-trees growing on them, and conſiſts for the moſt part of ſuch Trees, only ſome ſmall Buſhes and Underwoods intermixt, the Trees ſhall Privilege the whole; but if ſuch Trees grow *Sparſim*, and the Underwood is the greateſt part, then it muſt pay Tithes for the whole.

'Tis to be obſerved that Wood is Titheable only by Cuſtom, for before *Archbiſhop Stratford* made a Canon that it ſhould pay Tithes, it paid none, and as it is Titheable by Cuſtom, ſo it may be exempted from payment of Tithes, for preſcriptions are allowed *in non decimando* for Wood in the *Weld of Kent* and *Suſſex*, but ſuch a Preſcription was never allowed for Corn, becauſe that pays Tithes *de jure*.

A Cuſtom that the Parſon hath enjoyed ſuch a Wood parcel of the Mannor, *&c.* in ſatisfaction of all Tithe-Wood within that Pariſh is good, 1 *Rol. Rep.* 355.

So a Preſcription to pay the tenth Acre ſtanding, is good, 1 *Rol. Abr.* 645. *Plito.* 8.

Laſtly, the manner of Tything it is by the Pole or Pearch, or by the Tenth Faggot or Billet according to the Cuſtom of the place.

Wool.] This pays a mixt Tithe, and proportionable to the time the Sheep are in the Pariſh; as for inſtance, if forty Sheep yield eighty pound of Wool, and are depaſtured in one Pariſh for a whole Year, the Parſon ſhall have eight pound of Wool, and by conſequence but four pound if fed there only for half a Year, and ſo two pound for three Months, and but the Tenth of the twelfth part of the Wool if they are fed there for one Month and no longer.

If Sheep are killed and ſpent in the Owner's Houſe no Tithes are to be paid for their Skins, but their Wool is Titheable, 1 *Rol. Abr.* 646. *Plito.* 18.

And 'tis to be obſerved, that the Tithe-Wool ought to be paid on the day of ſhearing the Sheep.

There are ſeveral Preſcriptions relating to Tithe-Wool, as if a Man hath under ten Fleeces then to pay a penny for each

Fleece, and if more, then to pay the tenth part *ſine viſu & tactu* of the Parſon, but this is an unreaſonable Preſcription.

Neither is it a good *Modus* to pay the tenth pound for Tithes of Wool, if he doth not ſhew that he is to pay ſomething for if Tithe under ten pound; becauſe otherwiſe as to what is under ten pound, 'tis a *Modus in non decimando*, 1 *Rol. Abr.* 648. *Plito.* 4.

But 'tis a good *Modus* that in conſideration he did wind the Wool into a Fleece, to be diſcharged of the Tithes of that Wool which he ſheered from the Necks of the Sheep a Fortnight before and after *Michaelmas*, becauſe it appears ſuch ſheering could not be for the gain of the Wool alone, but to preſerve the Sheep from Vermin, 1 *Rol. Abr.* 649. *Plito.* 5.

So a Suggeſtion to pay the tenth part of Wool of *all the Sheep* he had before Lady-Day, and which he ſheared or ſold, and that it was to be in ſatisfaction of all the Wool of ſuch Sheep which ſhould be brought into the Pariſh after Lady-day is good, 1 *Rol. Abr.* 649.

So 'tis a good *Modus* that in conſideration a Pariſhioner hath time out of Mind paid Tithe-Wool of all Sheep at the Shearing, as well of thoſe which *he bought* but two days before the Shearing, as thoſe which were kept all the Year in the Pariſh, that he ſhould be diſcharged of the Tithes of thoſe he *ſhould ſell* but two days before the Shearing, 1 *Rol. Abr.* 648. *Plito.* 1.

Title.

THIS word as it relates to Eccleſiaſtical Perſons, was at firſt only the entring a Prieſts name in the Biſhop's Regiſtry, by which he was made one of his Clergy, and from which he could never be diſcharged without the Biſhop's conſent; and in thoſe days if a Man was not owned by ſome Biſhop, it was uſual to ſay that he was *ſine Titulo*.

But this was before there was any Parochial Diviſion, for afterwards the word Title came to be applyed to Pariſh Churches, for *Parochia* is *accolens ad ſacram ædem titulus autem ædes ipſa*, and ſometimes theſe words were promiſcuouſly uſed to ſignifie each other.

But when the Boundaries of Pariſhes were fixed, then the Parochial Clergy who had the greateſt maintenance by the extent and largeneſs of their Endowments were allowed by the Canon Law to have Curates, which were called *Capellani Parochiales* or *Stipendarii*, and the Rectors of thoſe Pariſhes might give ſuch Perſons a Title to receive Orders as Aſſiſtants to them,

them, tho' they had no legal Title to the Cure it ſelf; but then to make them more cautious in giving theſe Titles they were bound to maintain thoſe Curates if they ſhould happen to ſtand in need of it, or rather the Biſhop was to do it he Ordained a Man without a *Title*, that is, without any Aſſurance of being employed as an officiating Clergy-man in ſome Church or place of Divine Service.

This appears by the 33d Canon, which provides that no Perſon ſhall be admitted into Orders except he bringeth a Preſentation to the Biſhop, by which he is preſented to ſome void Church, or unleſs he bring a Certificate that he is provided of ſome Church within his Dioceſs, or of ſome Miniſters place vacant in a Cathedral or Collegiate Church, or that he is a Fellow of a College in one of our Univerſities; or except he is Maſter of Arts of Five Years ſtanding, or is to be admitted by the Biſhop himſelf in a ſhort time to ſome Benefice.

If the Biſhop ſhould admit him to Orders without any of theſe Titles, then he is to keep him till he is preferred, and if he refuſe he ſhall be ſuſpended by the Archbiſhop and one Biſhop more from giving Orders for one whole Year.

Veſtry.

THIS word *Ex vi Termini* ſignifies the place where the Veſtments of the Prieſts are kept.

The firſt and the greateſt Authority we have for it is from the Holy Scripture, for when *Jehu* intended to deſtroy the Worſhippers of *Baal*, he ordered thoſe who were over the Veſtry to bring out Veſtments for them, 2 *Kings* 10. 22.

It hath been the Cuſtom of all Nations to appropriate peculiar Veſtments to their Prieſts, not only when they are in the actual performance of Divine Offices, but when they are about other ordinary occaſions.

Our Church hath appointed ſuch diſtinguiſhing Veſtments for the Prieſts, not out of any pharaſaical Pretence to Purity in thoſe who wear them; but to diſtinguiſh from the Laiety thoſe who are ſet apart to Adminiſter about Holy things.

And not only thoſe who are of the inferiour Order of Prieſthood are thus diſtinguiſhed; but even the Prelates of our Church have peculiar Veſtments to diſtinguiſh them from other ranks and degrees of Men,

Thoſe of the *Roman* Biſhops are *Copes*, *Palls*, *Surplices*, *Hoods*, which are very Rich and Magnificent, but ours are Neat and Ornamental.

'Tis

'Tis true, about the beginning of the Reformation there was a very great conteſt about theſe Veſtments, for *Hooper* who was Biſhop of *Glouceſter* refuſed to be conſecrated in them, becauſe they were not (as he imagined) agreeable to the ſimplicity of the reformed Religion, but only invented for a pompous Celebration of the Maſs, and were conſecrated for that purpoſe.

But it is certain that theſe Veſtments were uſed by the ancient Fathers before there was any ſuch thing as Popery, and tho' they were afterwards abuſed, even to Superſtition, yet that could not be a tolerable reaſon for taking them away, for if ſo, then the Churches themſelves might, with the ſame Reaſon, be pulled down, becauſe they had alſo been conſecrated with many Superſtitious Ceremonies.

Vicar.

AFTER Dioceſſes were divided into Pariſhes, the Secular Clargy who had the Charge in thoſe places were called *Rectors*, and afterwards when their Rectories were appropriated to Monaſteries, the Monks kept the great Tithes; but the Biſhops were to take care that the Rectors place ſhould be ſupplied by another to whom he was to allow ſome portion of the ſmall Tithes for his Maintenance, and this was called a *Vicar*, *quaſi vicem Rectoris fungens*.

This Vicar was at firſt removeable *ad nutum prioris*, but by degrees he got a ſettled Maintenance which conſiſted in the Glebe and ſome portion of ſmall Tithes.

He is inſtituted and inducted in the ſame manner as a Rector, only with this difference, that over and above what is required of a Rector, he is to take an Oath of perpetual Reſidence on his Vicaridge *niſi aliter diſpenſatum foret ab Epiſcopo*, and without taking ſuch an Oath his Inſtitution is void.

Theſe Vicaridges were created when the King gave Licenſe to appropriate Benefices to Monaſteries, and that was about the beginning of the Reign of *H.* 3. but becauſe great Complaints might not be made of ſuch Appropriations, the Pope decreed that where a Benefice was appropriated there ſhould be a Vicaridge indowed under a Penalty if it was not.

But this Penalty was eaſily remitted at *Rome*, inſomuch that *Anno* 15 *R.* 2. *cap.* 6. the Parliament took it into Conſideration, and made a Law, that upon every Appropriation the Biſhiop of the Dioceſs ſhould ſee that the Vicar was competently endowed, which Law was of very little effect, becauſe

cauſe the Biſhops in thoſe days favoured the Monks too much, and permitted them to ſend one of their own number to officiate in the Pariſh Church, and ſo kept both the great and ſmall Tithes themſelves.

Therefore *Anno* 4 *H.* 4. *cap.* 12. another Law was made that in every Church appropriated, one ſhould be ordained *Vicar perpetual*, and be Canonically Inſtituted and Inducted (which the Monks were not) and alſo competently endowed at the diſcretion of the Ordinary; ſo that what the Vicar now Claims, is either by Endowment or Preſcription.

The Endowment is the Original Grant or Agreement made by the Abbot and Convent, or other Religious Body to or with the Vicar, they having the whole Benefice appropriated to them, and the *quantum* was ſettled by the Biſhop, who was to be the Moderator between them and the Vicar.

Theſe Grants were regiſtred in the Archives of the Biſhop, or in the Augmentation Office, but moſt of them are now loſt, and therefore if the Endowment it ſelf doth not appear, and if no particular proof can be made of it, yet the Appropriation is not void, eſpecially if a Vicar hath ever ſince that Statute been Inſtituted and Inducted into the Vicaridge, for in ſuch caſe it ſhall be preſumed that the Vicaridge was lawfully endowed, 2 *Cro.* 252.

And where the Vicar cannot produce the Endowment, there Preſcription uſually takes place, for if by conſtant uſage he hath enjoyed ſuch a particular Eſtate that ſhall be a ſufficient Evidence of the Endowment, and if he could produce the Original it ſelf and ſhould claim ſomething which is not mentioned in it, yet if he can prove that he and his Predeceſſors enjoyed it time out of mind, that will be a ſufficient proof to ſupport his Right to it, becauſe where there hath been a long and conſtant Poſſeſſion, it may be reaſonably preſumed that the Vicaridge hath been augmented with what the Vicar claims by the direction of the Biſhop himſelf upon citing all Perſons concerned.

The Endowment hath no relation to the Lands but to the Tithes, for if the Vicar preſcribes to have the ſmall Tithes, and if the Land had been Plowed time out of mind, ſo that the Parſon had the Tithe of the Corn, yet if 'tis converted to any other uſe, and ſmall Tithes grow on that very Land, the Vicar ſhall have them, 2 *Rol. Abr.* 335. *Plito.* 5.

Some Queſtions have been made concerning the meaning of words in ancient Endowments; as for inſtance, where it appeared to be *de decimis garbarum*, the queſtion was, who ſhall have the Tithe-Hay, and it was adjudged the *Vicar* ſhould

ſhould have it; for tho' *Garba* doth now ſignifie a Sheaf of Corn, yet ancient Grants ſhall not be expounded by the modern Acceptation of words, for 'tis probable that in former days *Garba* might be uſed to ſignifie Hay, or at leaſt that anciently Hay was bound in Bundles, 2 *Rol. Abr.* 335. *Plito.* 7.

So by the word *Altarage* the Tithes of Wool and Lamb, and of many other things are comprehended, but this muſt rather be by the force and power of Cuſtom then of the word it ſelf; that is, if the *Vicar* hath for a long time enjoyed ſuch Tithes, he ſhall have them ſtill as comprehended by that word.

But there are ſeveral Churches in this Nation where the Tithes are wholly impropriated and no *Vicaridge* Endowed, and there the Impropriators are bound to maintain Curates to perform Divine Service; but as for Appropriations whilſt they were in the hands of the Monks the Biſhop had power to encreaſe the Salary of the *Vicar*, and if he could do ſo where the *Vicaridge* was endowed, I can ſee no reaſon but that he may do it where all the Tithes are impropriated.

Upon theſe Endowments the *Vicar* hath an equal, tho' not ſo great an Intereſt in the Church as a Rector, for he is *perpetuus Vicarius*, the Soil in the body of the Church is his Freehold, for 'tis part of his Glebe, he muſt repair the Church, and for that purpoſe the Trees in the Church-yard belong to him, 2 *Rol. Abr.* 337. *Plito.* 3.

But this was by vertue of the Statute, 14 *Ed.* 3. *cap.* 17. for before that Act the Parſon and not the *Vicar* had the Freehold of the Glebe, he was ſubject to every charge of the *Vicaridge*, and if the *Vicar* himſelf was impleaded for any thing concerning it, he was to have aid of the Rector; he could not maintain *a juris utrum*, which he may do now by vertue of that Statute, and both the Parſon and *Vicar* have diſtinct and ſeparate Rights, and may maintain diſtinct Actions to recover ſuch Rights.

'Tis true, the *Vicaridge* did originally belong to the Parſonage, for it was derived out of it; but now by Preſcription it may be appendent to a Mannor, becauſe 'tis poſſible the Rector might have granted it ſo time out of mind.

But if there is no ſuch Grant the Rector is ſtill of common Right Patron of the *Vicaridge*, tho' by compoſition it may be ſettled otherwiſe, and therefore if he makes a Leaſe of his Parſonage the Patronge of the *Vicaridge* paſſes as incident to it, 2 *Rol. Abr.* 59. *Plito.* 4.

But as it was taken out of the Rectory, ſo it may be united to it again; and this may be done by the Ordinary and Patron as well when the *Vicaridge* is full as when 'tis vacant, and

tho'

tho' ſuch Reſtitution ſhould be defective when 'tis firſt made, yet being reputed to be good, the Statute of diſſolution hath fully veſted it in the Crown, 2 *Roll. Abr.* 337. *Plito* 1. 2 *Cro.* 517. *Palmer* 113. *Cro. Eliz.* 873.

And as a *Vicar* hath the Freehold of the Glebe, ſo he may preſcribe to have all the Tithes in the Pariſh, except thoſe of Corn, and by virtue of ſuch Preſcription he ſhall have the Tithes of thoſe new Seeds, as Clover-Graſs, Hops, *&c.* for tho' he cannot particularly preſcribe in ſuch Caſes, becauſe they are new things, yet they are within ſuch a general Preſcription, becauſe all ſmall Tithes are thereby comprehended, and the great Tithes excluded, 2 *Roll. Abr.* 334. *Plito* 7.

But becauſe *Vicaridges* are commonly endowed with ſmall Tithes only, I ſhall give an account what thoſe are.

Wood in it's nature is great Tithe; but yet if a Vicaridge is endowed *de minutis decimis*, and by virtue of that endowment the Vicar had uſually the Tithe of Wood, it ſhall paſs by theſe Words, 2 *Roll. Abr.* 335. *Plito* 8. *Het.* 135. 2 *Bulſt.* 27. *Winch.* 70.

It hath been a queſtion whether Saffron, Woad, Hemp, Hops, *&c.* ſhould pay ſmall Tithes or not; 'tis true, theſe things grow in nature of Herbs, and ſo may be accounted amongſt ſmall Tithes; but if they grow in great quantities of Land this changes them into great Tithes, that is, if whole Fields are Planted with them, and this was the Opinion of the Chief Juſtice in *B. R.* in a late Caſe between *Wharton* and *Liſle*, 3 *Lev.* 365. 4 *Mod.* 183. and 'tis probable it was grounded upon the Judgment in *Udal* and *Tindal*'s Caſe, *Hut.* 78.

But the quantity of Land ſowed with ſuch Seeds, cannot alter their nature, nor can it make a Rule to determin what ſhall be ſmall Tithes, and what great, for then, if a ſmall quantity of Land ſhould be ſowed with Corn that would make it ſmall Tithes, which no body will affirm, ſo that the nature of the thing planted or ſowed is chiefly to be conſidered, and not the quantity of Land on which 'tis ſowed; for things which grow in the nature of an Herb muſt be reckoned ſmall Tithes, let the proportion of Land on which they are ſowed be either more or leſs.

And here it may not be improper to mention the Statute of 29 *Car.* 2. *cap.* 8. which takes notice of Letters ſent by the King to the Biſhops, immediately upon his Reſtoration, directing them upon the renewing of Leaſes of Rectories and Tithes impropriate or appropriate to reſerve more than the ancient Rent, that it might be paid to the poor Vicars to augment their Vicaridges, which was to continue during the E-

ſtate

ſtate out of which it was granted, and afterwards, and that the Vicars ſhould be adjudged in the Poſſeſſion thereof to them and their Succeſſors, and ſhould have remedy to recover ſuch Rents by Diſtreſs or Action of Debt.

Such Leaſes are to be entred in a Parchment-Book, to be kept by the Biſhop's Regiſter, which being atteſted by the Biſhop himſelf in that Book, and that the augmentation was intended for ſuch uſe, ſhall be as a Record, and a Copy thereof proved by Witneſſes, ſhall be given in Evidence.

Viſitation.

THIS is that Office which is performed by the Biſhop once in three Years, or by his Archdeacon every Year, by viſiting the Churches throughout the Dioceſs, *ut populus illorum curæ commiſſus ſalubriter a paſtoribus & ordine gubernetur, & ; voc aſſiduis & piis Miniſtrorum officiis Eccleſiarum ipſarum ſtatus recte conſervetur.*

'Tis the Duty of a Commiſſary to Summon the Churchwardens and Sideſmen to a Viſitation, but he hath no Authority to Summon any other Perſons; but if he doth Summon thoſe Perſons, and they refuſing to Appear, ſhould be Excommunicated for this Contempt, a Prohibition would be granted, *Noy* 123.

Two things are requiſite in theſe Viſitations:

(1.) The Charge.

(2.) The Enquiry.

The Charge conſiſts of ſuch things which the Viſitor thinks proper to impart to the Clergy; but 'tis uſually to put them in mind of their Duty, and to perſwade them to perform it.

The Enquiry did formerly conſiſt in ſeveral Articles taken out of the Canons, and the Biſhop's Viſitation being accounted an Epiſcopal Sinod, there were at that time certain Perſons who attended it, and who were called *Teſtes Sinodales*, or *juratores Sinodi*, and they were to preſent thoſe who were negligent in performing religious Offices, or any irregularities amongſt the Clergy, both in reſpect to their Morals and Behaviour, and likewiſe all Dilapidations, and generally what they found to be amiſs in the Dioceſs.

The Biſhop at firſt exerciſed this Jurisdiction alone; it was what was implied in his very Office, and this he was to do in every Pariſh throughout his Dioceſs once in a Year, there to examine the Miniſter and the People, which he might do with more eaſe at that time, becauſe Pariſh Churches were not ſo numerous then as afterwards.

When

When this was diſuſed, then Eccleſiaſtical Perſons were to be aſſembled in a certain place, and enquiry was made upon Oath concerning the State of the Clergy, and at this place they were all bound to appear.

Afterwards, when Biſhops came to be Miniſters of State, and to attend the Courts of Kings, which began in the *Norman* Reigns, then Archdeacons were veſted with this Juriſdiction under the Biſhops, and viſited in thoſe Years wherein the Biſhops did not.

But ſtill the Biſhops were to viſit once in three Years, and being then the King's Barons and Stateſmen, they came with very great Equipage, inſomuch, that by the Council of *Lateran* their number was limited according to their Qualities, *viz.* if the Viſitor was an Archbiſhop, he was not to have above 50 Horſe in his Retinue; if a Biſhop he was not to exceed 30; if a Cardinal then 25; if an Archdeacon, he was to have no more than 7, and a Dean but two; and if they reſpectively exceeded thoſe numbers, then no procuration was due for the maintenance of the Supernumeraries.

But even this was very chargeable to the Parochial Clergy, for the Viſitor was to be maintained at their expence a Day and a Night in every Pariſh, and therefore it was thought fit to turn that charge into a certain Sum, which is now called Procurations, and this is paid to Archdeacons in that very Year wherein Biſhops viſit, for 'tis by ſome affirmed to be due to them *ratione Officii*, and ſome ſay 'tis due to them by virtue of the Statute of 33 *Hen.* 8. *cap.* 5. by which theſe Duties are made Penſions:

The firſt of theſe Opinions is contrary to ſeveral Canons, which not only enjoyn Perſonal Viſitations, but expreſly forbid any Procurations to be paid where the Archdeacon himſelf did not viſit in Perſon.

But notwithſtanding thoſe Canons, cuſtom hath ſo far prevailed, that the Archdeacon receives theſe Fees in the Biſhop's Triennials, when they do not viſit in Perſon; but inſtead of that they hold two Chapters about *Eaſter* and *Michaelmas*, and there, by themſelves or their Officials, they formally enquire into the ſtate and condition of the Church, which enquiry is now called a Viſitation, and for which they are entituled to theſe Fees.

Having been ſo long upon the manner of *Viſitations*, I ſhall proceed now to ſhew,

(1.) Who are the *Viſitors*.

(2.) Who may be *Viſited*.

As

As to the firſt, 'tis certain, that by the Common Law the Kings and Queens of *England* have power to viſit, to reform, to correct all diſorders in the Church; but generally the Biſhop is the *Viſitor*, not only of the Churches within his Dioceſſes, but of every Spiritual Hoſpital; for all Abbies and Priories were formerly viſitable by him, if not exempted from his Juriſdiction; and thoſe which were ſo exempted before the Diſſolution, were by the Statute of 31 *Hen.* 8. made ſubject to his *Viſitation*, if they were within his Dioceſs, or to the Juriſdiction of ſuch Perſons whom the King ſhould appoint.

'Tis true, ſome alteration was made of this Law, by the Statute of 1 *Ph.* & *M. cap.* 8. but by the Act of 1 *Eliz.* the power of *Viſitation* was reſtored to the Ordinary.

And becauſe Colleges and other Schools of Learning are generally eſteemed part of the Eccleſiaſtical Body, therefore I ſhall give the Reader an account by whom they are to be viſited.

And as to this matter, they are ſubject to a double *Viſitation* in divers reſpects, *viz.* by the Archbiſhop *jure Metropolitico*, this was claimed by Archbiſhop *Laud*, and Decreed in Council, that he had a right to viſit both the Univerſities, as to their Doctrine, Church-Diſcipline and Ceremonies, but that he had no right to meddle with the private Statutes of the Founders.

They are likewiſe to be viſited by the Founders and their Heirs, unleſs they appoint a ſpecial *Viſitor*, and then they are ſubject to his *Viſitation* in point of Government:

This appears in that famous Caſe of *Exceſter* College, wherin the Power and Authority of a *Viſitor* was debated, and the Law is now ſettled as to that matter, which is thus:

Dr. *Bury* was Rector of *Exceſter* College, and being deprived by the Biſhop of *Exceſter*, whom the Founder had appointed to be *Viſitor*, the queſtion was, whether that Sentence of Deprivation was examinable in the Courts at *Weſtminſter*.

It was the Opinion of three Judges that it was, becauſe the College is a Temporal Corporation, and the deprivaty of the Head is a Temporal thing.

That that Court of *B. R.* hath a ſuperintendency over all the proceedings of *Viſitors*, which may appear by many inſtances of a higher nature; for Commiſſioners of Sewers, and of Bankrupts, tho' they derive their power from Acts of Parliament, yet their proceedings are examinable in that Court.

'Tis true, the *Viſitor* is made a Judge by the Founder, and ſo is an Arbitrator by the Parties, but his Judgment is uſually ſet aſide, and ſo may the *Viſitors*; for if his Sentence ſhould be

be Final, then great part of the Nation in former times would not have been ſubject to the rules and government of the Common Law, becauſe the rich Men were got into Guilds and Fraternities; the learned Men into Halls and Colleges; the poor Men into Hoſpitals, and thoſe called religious into Monaſteries and Abbies, theſe were all Perſons and Places of publick uſe and concern to the Nation, and therefore it would be abſurd to affirm, that they were ſubject only to a *Viſitor*, and to be governed by particular Laws amongſt themſelves, exempted from the power and authority of the Common Law.

But upon a Writ of Error brought in the Houſe of Peers, this Judgment was reverſed upon theſe Reaſons, *viz.* the right or property of the Land which was in the Founder, gave him a viſitatorial power in Law, and the Charity given by him muſt be ſubject to ſuch Limitations as he thought fit to impoſe on thoſe who receive it, and therefore, he having appointed a *Viſitor*, he is made *ſidei Commiſſarius*, and his Sentence ſhall be preſumed the Sentence of the Founder himſelf, which cannot be thought unjuſt, eſpecially by thoſe who partake of his Charity, and if not unjuſt, then not to be examined elſewhere.

And though Corporations for publick Government, and which ſubſiſt meerly by grants from Kings and Princes, and which never had any particular Founders or *Viſitors* are ſubject to the Courts at *Weſtminſter*; yet Corporations for Charity, founded and endowed by private Perſons, are ſubject to the rules of the Founders.

But where the Perſons to whom the Charity is given are not Incorporated, but are only a meer arbitrary Society of Men, there is no ſuch viſitatorial Power, becauſe the intereſt of the revenue is not veſted in them, which ſhews, that where they are Incorporated, the right of *Viſitation* ariſes from the foundation, and ſo the *Viſitor* acts as Founder, and by the ſame Authority, but not meerly by the ſame, for the Founder himſelf could not give a *Viſitor* any ſuch power to remove a Perſon out of a Society, ſo as not to be accountable to any other Court.

Therefore the *Viſitor* muſt be veſted with ſome other power, beſides the will of the Founder, and that muſt be ſuch which he hath by virtue of the Grant from the Crown, by which this College was made a legal Corporation, tho' it was left to the will of the Founder to appoint what Laws he thought fit to govern it.

As for Authorities in Law there is Dr. *Coveney's* Caſe, who was Preſident of *Magdalen College*, and deprived by the Biſhop of *Wincheſter*, who was *Viſitor*, and the Dr. Appealed to the Queen in Chancery, and it was reſolved that it did not lie.

'Tis true, there is an inference made in that Caſe, *viz.* becauſe no Appeal did lie, therefore *ex hoc ſequitur*, that the Dr. might have an Aſſize, but this muſt be a miſtake, for a Head of a College cannot maintain an Aſſize, becauſe he hath no ſole Seiſin.

There can be no inſtance given of ſuch an Action, and that inference was little regarded, for in the very next year the Archbiſhop of *Canterbury* nominated a Warden to *Merton* College, as being Patron upon a devolution to him: Some of the Fellows oppoſed the Admiſſion of the nominee, and thereupon the ſame Archbiſhop proceeded againſt them as *Viſitor*, and deprived them, yet no Aſſize was brought.

About ſix Years afterwards, one *Harriſon* was choſen Preſident of *Corpus Chriſti* College, and after he was Elected, one *Cole* was nominated by the Queen, but the Fellows refuſing to admit him, the Biſhop of *Wincheſter*, who was their *Viſitor*, deprived them, yet no Aſſize was brought by them.

The Head of a College is only a viſible Perſon of the Body aggregate, he cannot ſupport a real Action, becauſe he hath no Title to the Rents before a Dividend.

'Tis true, the power of a *Viſitor* is great, and 'tis neceſſary it ſhould be ſo, for the peace and quiet of the College is more to be regarded than the perſonal injury of any private Perſon.

Therefore the Founders took particular care to prevent all Law-Suits amonſt the Members of thoſe Societies, as knowing them to be deſtructive to that quietneſs which is neceſſary for their Studies, and 'tis for this reaſon that in ſome of their Statutes they have provided, that if the Head ſhould be deprived *nulla actio nullum juris remedium canonici vel civilis habeat.*

The Courts at *Weſtminſter* have always denied *Mandatory* Writs to reſtore Perſons to their Fellowſhips; they did ſo in Dr. *Withrington's* Caſe, who was deprived of his Felloſhip of *Chriſt College* in *Cambridge.*

So they did in Dr. *Patrick's* Caſe the very next Year, who was choſen Maſter of the Queen's College, but another was admitted, and tho' it was urged that this was matter of Freehold, and that it was a Temporal thing, yet he had no remedy.

Anno 22 *Car.* 2. *Daniel Appleford* was deprived of his Fellowſhip of *New College*, but had no remedy at Law, and the reaſon is, becauſe in all theſe Caſes an Appeal lay to the proper *Viſitor*, who hath a Juriſdiction, and whoſe determinations are final, for otherwiſe all Suſpentions and Deprivations would be examinable in the Courts of Law, and every little Controverſie in the College would be brought to *Weſtminſter-Hall*, which would be of great advantage to Attornies and Lawyers, but none to the Univerſities.

If we look into the practiſe of all civilized Nations, we ſhall find thoſe places had always a peculiar Juriſdiction within themſelves, by which all differences ariſing amongſt Scholars were to be decided there, and Exemptions were allways allowed them from the Juriſdiction of Temporal Courts, *ne a ſtudiis avocentur propter lites alibi motas.*

I ſhall only mention Lay-Hoſpitals, which are commonly built and endowed to ſupport poor People, and thoſe are viſitable by the Patron.

This is any unlawful poſſeſſion of a Church, by a Perſon who hath no manner of right, and who comes in upon the Preſentation of a Common Perſon, when in truth the right of Patronage did lawfully belong to another, but in ſuch Caſe, if the Clerk ſhould be Admitted and Inſtituted, and there is a Plenarty for Six Months, the true Patron had no other remedy at Common Law, but to recover his right by a Writ of right of Advowſon:

And that he could not have unleſs he had a Fee-ſimple, and ſome of his Anceſtors had preſented once; for if he had a Fee-ſimple by purchaſe, yet if he never preſented, or if his Anceſtors had preſented, and he had only an Eſtate Tail, he was remedileſs at Common-Law, but this is prevented by the Statute of *W.* 2. *cap.* 5. (z) ſo that now, if Tenant in Tail ſuffer an Uſurpation and Dies, his Iſſue may recover in a *Quare Impedit.*

But that Preſentation was quite loſt *pro hac vice*, becauſe, tho' the Incumbent came in by a wrong Patron, yet his Admiſſion and Inſtitution were legal and judicial Acts which were performed by the Biſhop himſelf, who can never be ſuppoſed to be injurious to the Patronage of another; and therefore it was held reaſonable that ſuch an Incumbent ſhould

(z) 2 Inſt. 357.

be quieted in his Poſſeſſion, becauſe the Service of God and inſtructing the People in his Laws are more to be regarded than the private Rights of any particular Perſons.

And even in the caſe of the Queen (*a*) tho' an Uſurpation and Plenarty was no Bar to her Right, yet ſhe could not preſent before the Incumbent was removed by a Judgment in a *Quare Impedit*, ſhe is only put out of Poſſeſſion, ſo that ſhe muſt bring that Action; but ſhe is not diveſted of the Inheritance of the Advowſon by any Uſurpation whatſoever.

But to return to the caſe of a *common Perſon*, the Law hath provided a remedy by three ſeveral Writs againſt an Uſurper, one of the Right, *viz.* *A Writ of Right of Advowſon*, and two of the Poſſeſſion, *viz.* a *Quare Impedit* and an Aſſize of Dareign Preſentment.

I have treated of a *Quare Impedit* under that Title, Aſſizes of Dareign Preſentment are ſeldom brought, therefore I ſhall proceed to ſhew how an *Advowſon* may be loſt by Uſurpation.

'Tis certain that a *Preſentation* may be loſt by the negligence of the Patron in not preſenting within ſix Months after the Avoidance, and 'tis as certain that the Inheritance of an *Advowſon* may be loſt by Uſurpation.

But then ſuch Uſurpation muſt commence.

(1.) Upon ſome Preſentation which is good in Law.
(2.) It muſt be to a void Church.
(3.) There muſt be an Admiſſion and Inſtiution upon it.

(1.) It muſt commence on a Preſentation which is good in Law, and therefore it can never be upon a wrongful Collation, for that cannot make an Uſurpation againſt the true Patron, becauſe ſuch Collation ſhall be taken only as a Proviſion for performing Divine Offices during the vacancy, and therefore if the Patron preſents his Clerk, and the Biſhop refuſes him, and a *Quare Impedit* is brought, the Biſhop can never plead Plenarty for ſix Months upon ſuch wrongful Collation in bar to that Action. But tho' a wrongful Collation will not make an Uſurpation againſt the Patron, yet if 'tis made upon him who hath a Right to Collate, and there is a Plenarty for ſix Months that will put him to recover it by a Writ of right of Advowſon, 6 *Rep.* 50.

(*a*) 6 Rep. 30, 49, b. 2 Inſt. 357.

It

It can never commence upon a Preſentation which is void in its ſelf, as for inſtance, if a Corporation doth miſtake their name in the Preſentation, tho' the Clerk is admitted, and the ſix Months paſs, that will not make an Uſurpation, becauſe the Preſentation was void, 1 *Bulſt.* 91. 2 *Cro.* 248.

So if the Preſentation is upon a Simoniacal Contract that will not make an Uſurpation upon the right Patron for the reaſon before mentioned; for in ſuch caſe the Preſentee was never lawful Incumbent, 2 *Roll. Abr.* 370. *Co. Lit.* 120.

So if a Perſon is preſented to a Donative, and afterwards Admitted, Inſtituted, and Inducted, this will not make an Uſurpation becauſe a Donative is not preſentable.

So where the Queen recites in her (*b*) Preſentation a Title which ſhe had not, this will not make an Uſurpation, for it is void.

(2.) The Preſentation muſt be to a void Church, that is, where the Avoidance is ſuch that the Patron is not bound to preſent till notice, but may preſent if he pleaſe without notice; as if the Clerk is deprived for a Crime, the Patron may take notice of it if he will, and may preſent another, but he is not bound to do it, becauſe the Church is not abſolutely void to him, ſo that a Lapſe may incur till he hath actual notice of the Deprivation.

So upon a Reſignation the Church is void, and the Patron ought to have notice of it; but if a Stranger preſents in ſuch caſe, and his Preſentation is not void in Law, but his Clerk is *inducted* on it, and continues in Poſſeſſion for ſix Months, this is an Uſurpation, and he cannot be removed, becauſe the *Induction* is a notorious Act, of which the Patron (*c*) ought to take notice at his Peril; but if ſuch Reſignation had been made upon any Contrivance, and on purpoſe to defraud the Patron, there 'tis otherwiſe.

There is another thing to be obſerved, *viz.* that formerly where an Inheritance of an Advowſon was gained by an Uſurpation, there muſt be no manner of *privity* between the Uſurper and the Perſon upon whom 'tis made.

Firſt, there muſt be no privity (*d*) in Blood between them, for if an Advowſon deſcends to Coparceners, and one Uſurps upon the turn of the other, yet that will not put her out of Poſſeſſion, but ſhe may preſent when her turn comes.

(*b*) Hob. 302. (*c*) 2 Roll. Abr. 369. Plito 3. (*d*) 2 Roll. Abr. 372. Plito 5.

But

But now the Law is otherwiſe, for where there are three Coparceners (*e*) and they make Partition to preſent by turns, and an Uſurpation is made upon the turn of one, it ſhall put all out of Poſſeſſion.

So there was to be no privity of Eſtate (*f*) between them, and therefore if a Leſſor for Years of an Advowſon uſurps upon his Leſſee, this bars him of that Preſentation, but not of the next turn.

But now if there are two Tenants in Common, or Jointenants of an Advowſon, (*g*) and one preſents alone, this doth not put the other out of Poſſeſſion, for upon the next Avoidance they may join in the Preſentation, and this is by reaſon of the privity of Eſtate which is between them.

But there are ſome Advowſons which are protected by Law from all manner of Uſurpations, as for inſtance, thoſe Advowſons of which the Queen is ſeiſed in her own Right.

'Tis true, the Law was held otherwiſe formerly, *viz.* that a double Uſurpation * diveſted the Queen of the Inheritance of her Advowſon, and that ſhe ſhould be put to her Writ of Right to recover it, as a common Perſon is upon a ſingle Uſurpation.

But this was denied by my Lord *Anderſon* (*h*) in the caſe of the King againſt the Biſhop of *Winton*; for as he cannot be diſpoſſeſſed of Land, ſo he cannot be put out of poſſeſſion of an Advowſon, and he laid it down as a Rule, that of things tranſitory he may be put out of Poſſeſſion, but not of an Inheritance.

This learned Judge was over-ruled by three more; but upon a Writ of Error brought, their Judgment was reverſed, for an Uſurpation upon the (*i*) Queen's Advowſon, and a Plenarty for ſix Months binds her only as to the Poſſeſſion, and not as to the Right of the Advowſon; ſo that ſhe may remove the Uſurper at any time by a Judgment in a *Quare Impedit.*

And the Law is now ſettled (*k*) that neither two or more Uſurpations do diſpoſſeſs the Queen of her Preſentation, for as to her the Incumbent is a Treſpaſſer (*l*) and as ſhe may remove him whilſt living, ſo ſhe may preſent after his Death.

(*e*) 2 Vent. 39. (*f*) 2 Roll. Abr. 371. Plito. 2. (*g*) 2 Roll. Abr. 373. Plito. 12. 1 And. 63. * Dyer 351. (*h*) 2 Cro. 54. (*i*) 2 Cro. 123. 1 Brownl. 166. March. 90. 2 Roll. Abr. 371. Plito. 5. (*k*) Owen 43. 1 And. 81. Moor. 338. (*l*) Moor 421. Cro. Eliz. 519.

So

So likewiſe Advowſons of which Biſhops are ſeized in right of their Churches are protected againſt Uſurpations, which may be to the prejudice of their Succeſſors, tho' ſuch Uſurpations do bind during the life of the Biſhops themſelves, yet after their deceaſe, the Succeſſors may have a *Quare Impedit* (*m*) either in the life time of the Uſurpers, or preſent to the next turn after their death, and this is by vertue of the Statute, 1 *Eliz.* which reſtrains *Alienations* by Biſhops.

And the Law may be the ſame upon the Statute, 13 *Eliz. cap.* 10. as to all other *Eccleſiaſtical Perſons* who are ſeized of Advowſons in right of their Churches, for they are reſtrained by that Statute from *making Eſtates* other then for 21 Years or three Lives.

(*m*) 2 Cro. 673. Jones. 46.

FINIS.

BRITISH MUSEUM
28 56
APR

FINIS.